State Administration Council

Wednesday, March 29, 2006
1:00 PM – 2:30 PM
MORRIS HALL (17 HOB)

Allan G. Bense
Speaker

Donald "Don" Brown
Chair

Council Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

State Administration Council

Start Date and Time:	Wednesday, March 29, 2006 01:00 pm
End Date and Time:	Wednesday, March 29, 2006 02:30 pm
Location:	Morris Hall (17 HOB)
Duration:	1.50 hrs

Consideration of the following bill(s):

HB 61 CS Postsentencing Testing of DNA Evidence by Quinones, Bogdanoff
HB 125 CS Voter Registration by Evers
HB 573 Disabled Veterans by Bilirakis
HJR 631 CS World War II Permanently Disabled Veterans' Discount on Homestead Ad Valorem Tax by Sansom
HB 687 CS Public Records by Adams
HB 1059 Deduction and Collection of a Bargaining Agent's Dues and Uniform Assessments by Rivera
HB 1145 Official State Designations by Evers
HB 7045 Review under the Open Government Sunset Review Act regarding Supplemental Rebate Agreements by Governmental Operations Committee
HB 7047 Review under the Open Government Sunset Review Act regarding the Tobacco Settlement Agreement by Governmental Operations Committee
HB 7049 Review under the Open Government Sunset Review Act regarding the Florida Surplus Lines Service Office by Governmental Operations Committee
HB 7061 Review under the Open Government Sunset Review Act regarding Deferred Presentment Providers by Governmental Operations Committee
HB 7063 Review under the Open Government Sunset Review Act regarding the Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute by Governmental Operations Committee
HB 7115 Review under the Open Government Sunset Review Act regarding Autopsy Photographs and Video and Audio Recordings by Governmental Operations Committee
HJR 7143 Rules of Construction by Judiciary Committee
HB 7161 Public Records Exemption for Alternative Investments by Governmental Operations Committee

NOTICE FINALIZED on 03/27/2006 15:58 by ELLINOR.MARTHA

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 61 CS Postsentencing Testing of DNA Evidence
SPONSOR(S): Quinones and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 186

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Governmental Operations Committee	6 Y, 0 N, w/CS	Williamson	Everhart
2) Criminal Justice Committee	7 Y, 0 N	Cunningham	Kramer
3) Criminal Justice Appropriations Committee	4 Y, 0 N	DeBeaugrine	DeBeaugrine
4) State Administration Council		Williamson	Bussey
5)			

SUMMARY ANALYSIS

Current law provided a four-year window for a convicted person claiming innocence to file a postconviction motion seeking the testing of DNA evidence. The four-year window expired October 1, 2005.

The bill removes the four-year time limitation and expands those eligible to request DNA testing. Any person convicted of a felony and sentenced, not just those who claimed innocence, may petition the court for postconviction DNA testing. They may petition for the testing at any time following the date that the judgment and sentence is final. In addition, the bill requires the maintenance of physical evidence until the defendant's sentence is completed.

Application of the bill's provisions is retroactive to October 1, 2005.

The fiscal impact of the bill is indeterminate. Please see fiscal notes for further explanation.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill requires governmental entities to maintain physical evidence for a longer period.

Safeguard individual liberty – The bill allows any person to file a petition for postconviction DNA testing without worrying about meeting a deadline for filing the motion.

B. EFFECT OF PROPOSED CHANGES:

EFFECT OF BILL

The bill deletes the timeframe for filing petitions for postconviction DNA (deoxyribonucleic acid) testing. Current law provides a four-year window for a person maintaining his or her innocence to file a postconviction motion seeking the testing of DNA evidence. The four-year window expired October 1, 2005.

Any person convicted of a felony and sentenced may petition the court for postconviction DNA testing at any time following the date that the judgment and sentence is final. As such, a person who pleads guilty or who maintains his or her innocence is eligible to petition the court for DNA testing. Current law only allows a person maintaining his or her innocence to petition the court for postconviction DNA testing.

The bill requires the maintenance of physical evidence until the defendant's sentence is completed. Governmental entities cannot dispose of the evidence prior to the defendant's completion of his or her sentence.

Application of the bill's provisions is retroactive to October 1, 2005.

BACKGROUND

GENERAL BACKGROUND

The legislature first addressed the issue of postconviction DNA testing in 2001. It gave a person, convicted at trial and sentenced, a statutory right to petition for postconviction DNA testing of physical evidence collected at the time of the crime. This right is based on the assertion that the DNA test results could exonerate that person or alternatively reduce the sentence.[1] In order to petition the court, the person must:

- Be convicted at trial and sentenced;
- Show that his or her identity was a genuinely disputed issue in the case and why;
- Claim to be innocent; and
- Meet the reasonable probability standard.[2]

If the trial court determines that the facts are sufficiently alleged, the state attorney must respond within 30 days pursuant to court order. The trial court must make a determination based on a finding of whether:

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[1] *See* ch. 2001-97, L.O.F.; ss. 925.11 and 943.3251, F.S.

[2] The reasonable probability standard provides that the person would have been acquitted or received a lesser sentence if DNA testing was performed at the time of trial or at the time of the petition under the evolving forensic DNA testing technologies.

- The physical evidence that may contain DNA still exists;
- The results of DNA testing of that evidence would have been admissible at trial;
- There is reliable proof that the evidence has not been materially altered;
- There is reliable proof that the evidence would be admissible at a future hearing; and
- A reasonable probability exists that the defendant would have been acquitted of the crime or received a lesser sentence if DNA test results had been admitted at trial.

If the court denies the petition for DNA testing, there is a 15-day period to file a motion for rehearing. The 30-day period for filing an appeal is tolled until the court rules on the motion. Otherwise, either party has 30 days to file an appeal of the ruling. The order denying relief must include notice of these time limitations. If the court grants the petition for DNA testing, the defendant is assessed the cost of the DNA testing unless the court finds that the defendant is indigent. The Florida Department of Law Enforcement (FDLE) performs the DNA test pursuant to court order.[3] FDLE provides the test results to the court, the defendant, and the prosecuting authority.

CURRENT TIME LIMITATIONS

Current law imposes a four-year period for filing such petitions. The time limitation is measured from the later of the following dates based on the law's effective date of October 1, 2003:

- Four years from the date the judgment and sentence became final;
- Four years from the date the conviction was affirmed on direct appeal;
- Four years from the date collateral counsel was appointed;[4] or
- October 1, 2005.[5]

The law provides a catchall exception to the four-year time limitation. A person convicted at trial and sentenced can petition at any time for postconviction DNA testing if the facts upon which the petition is founded were unknown or could not have been known with the exercise of due diligence.

PRESERVATION OF PHYSICAL EVIDENCE

Current law requires preservation of physical evidence collected at the time of the crime if postconviction DNA testing is possible.[6] With the exception of death penalty cases, governmental entities maintain physical evidence for at least four years or until October 1, 2005.[7] Evidence in death penalty cases is preserved for 60 days after the execution of the sentence. Governmental entities can dispose of physical evidence earlier under certain conditions.[8]

Most recently, the governor issued Executive Order 05-160.[9] The order requires governmental entities in the possession of any physical evidence to preserve the evidence if DNA testing may be requested.

RIGHTS TO APPEAL, GENERALLY

Under current law, a convicted person has certain rights to appeal on direct appeal or on matters that are collateral to the conviction.[10]

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[3] *See* s. 943.3251, F.S.
[4] This is applicable solely in death penalty cases.
[5] Section 925.11(1)(b), F.S.
[6] Section 925.11(4), F.S.
[7] *See* s. 925.11(4), F.S.
[8] Section 925.11(4)(c), F.S., provides the conditions for early disposal of physical evidence. Any counsel of record, the prosecuting authority, and the Attorney General must receive notice prior to the disposition of evidence. Within 90 days after notification, if the notifying governmental entity does not receive either a copy of a petition for postconviction DNA testing or a request not to dispose of the evidence because of the filing of a petition, the evidence may be disposed of, unless some other provision of law or rule requires its preservation or retention.
[9] The order was issued August 5, 2005.
[10] Article V, section 4(b) of the Florida Constitution conveys a constitutional protection of this right. *See Amendments to the Florida Rules of Appellate Procedure*, 696 So.2d 1103 (Fla. 1996).

DIRECT APPEALS AFTER TRIAL

Matters raised on direct appeal include evidentiary rulings made by the trial court during the course of the defendant's trial, and other matters objected to during the course of the trial such, as the jury instructions, prosecutorial misconduct, and procedural rulings made by the trial court. The legislature codified the "contemporaneous objection" rule. It is a procedural bar that prevents defendants from raising issues on appeal not objected to at the trial level. The rule allows trial court judges to consider rulings carefully, perhaps correcting potential mistakes at the trial level.

In *State v. Jefferson*,[11] the Florida Supreme Court found that the provision did not represent a jurisdictional bar to appellate review in criminal cases, but rather that the legislature acted within its power to "place reasonable conditions" upon this right to appeal.[12]

APPEAL OR REVIEW AFTER A PLEA OF GUILTY OR NOLO CONTENDERE

Appeal rights are limited when a defendant pleads guilty or *nolo contendere* (no contest). Such a plea means a defendant chooses to waive the right to take his or her case to trial.[13]

In *Robinson v. State*,[14] the Florida Supreme Court reviewed the constitutionality of the statutory provision. The court upheld the statute making it clear that once a defendant pleads guilty the only issues for appeal are actions that took place contemporaneous with the plea. The court stated: "[t]here is an exclusive and limited class of issues which occur contemporaneously with the entry of the plea that may be the proper subject of an appeal. To our knowledge, they would include only the following: (1) subject matter jurisdiction, (2) the illegality of the sentence, (3) the failure of the government to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea." These principles continue to control.

COLLATERAL REVIEW

Postconviction proceedings, also known as collateral review,[15] usually involve claims that:

- The defendant's trial counsel was ineffective;
- There is newly discovered evidence; and
- The prosecution failed to disclose exculpatory evidence.

The defendant must file a motion in the trial court where he or she was tried and sentenced.[16] Unless the record in the case conclusively shows that the defendant is entitled to no relief, the trial court must order the state attorney to respond to the motion and may then hold an evidentiary hearing.[17] If the trial court denies the motion for postconviction relief, with or without holding an evidentiary hearing, the defendant is entitled to appeal this denial to the District Court of Appeal with jurisdiction over the circuit court where the motion was filed.[18]

Motions for postconviction relief based on newly discovered evidence must be raised within two years of the discovery of such evidence.[19] The Florida Supreme Court has held that the two-year time limit

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[11] 758 So.2d 661 (Fla. 2000).
[12] *Id.* at 664 (citing *Amendments to the Florida Rules of Appellate Procedure, supra*, at 1104-1105).
[13] Section 924.06(3), F.S.
[14] 373 So.2d 898 (Fla. 1979).
[15] Procedurally, collateral review is generally governed by FLA. R. CRIM. P. 3.850.
[16] The motion must be filed within two years of the finalization of the defendant's judgment and sentence unless the motion alleges that the facts on which the claim is based were unknown to the defendant and could not have been ascertained by the exercise of due diligence. *See* FLA. R. CRIM. P. 3.850(b).
[17] *See* FLA. R. CRIM. P. 3.850(d).
[18] In order to grant a new trial based on newly discovered evidence, the trial court must first find that the evidence was unknown and could not have been known at the time of trial through due diligence. In addition, the trial court must find that the evidence is of such a nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So.2d 512 (Fla. 1998); *Torres-Arboleda v. Dugger*, 636 So.2d 1321 (Fla. 1994).
[19] *See Adams v. State*, 543 So.2d 1244 (Fla.1989).

for filing a motion based on newly discovered evidence begins to run on a defendant's postconviction request for DNA testing when the testing method became available. For example, in *Sireci v. State*,[20] the Florida Supreme Court held that the defendant's postconviction claim filed on his 1976 conviction, which was filed in 1993, was time barred because "DNA typing was recognized in this state as a valid test as early as 1988."[21]

A defendant is entitled to challenge a conviction and death sentence in three stages. First, the public defender or private counsel must file a direct appeal to the Florida Supreme Court. An appeal of that decision is to the U.S. Supreme Court by petition for writ of *certiorari*. Second, if the U.S. Supreme Court rejects the appeal, the defendant's sentence becomes final and the state collateral postconviction proceeding or collateral review begins.[22] Third, the defendant seeks a federal writ of *habeas corpus*.[23] Appeals of federal *habeas* petitions from Florida are to the U.S. Court of Appeals for the Eleventh Circuit and then to the U.S. Supreme Court. Finally, once the governor signs a death warrant, a defendant typically files a second or successive collateral postconviction motions and a second federal *habeas* petition, along with motions to stay the execution.

C. SECTION DIRECTORY:

Section 1 amends s. 925.11, F.S., relating to postconviction DNA testing.

Section 2 provides an effective date of "upon becoming a law," applied retroactively to October 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   Indeterminate. See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

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[20] 773 So.2d 34 (Fla. 2000).

[21] *Id.* at 43. *See also Ziegler v. State*, 654 So.2d 1162 (Fla. 1995).

[22] Rules 3.850, 3.851 and 3.852, FLA. R. CRIM. P., control state collateral postconviction proceedings. Unlike a direct appeal, a collateral postconviction proceeding raises claims that are "collateral" to what transpired in the trial court. Consequently, such postconviction proceedings usually involve three categories of claims: ineffective assistance of trial counsel; denial of due process by the prosecution's suppression of material, exculpatory evidence; and newly discovered evidence, for example, post-trial recantation by a principal witness. Since the consideration of these claims often require new fact-finding, collateral postconviction motions are filed in the trial court that sentenced the defendant to death. Appeals from the grant or denial of postconviction relief are to the Florida Supreme Court.

[23] This is a proceeding controlled by Title 28 U.S.C. § 2254(a). Federal *habeas* allows a defendant to petition a U.S. district court to review whether the conviction or sentence violates or was obtained in violation of federal law. Federal *habeas* is almost exclusively limited to consideration of claims previously asserted on direct appeal or in state postconviction proceedings.

The bill may impose an indeterminate increase in costs incurred in storage and preservation of evidence in the custody of local governmental entities, including, but not limited to, police and sheriff's departments, clerks of the court,[24] and hospital facilities.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may impose an indeterminate increase in costs incurred in storage and preservation of evidence in the custody of nongovernmental entities, including, but not limited to, private labs, hospital facilities, and private counsels' offices.

D. FISCAL COMMENTS:[25]

The FDLE has indicated that the costs of additional DNA tests could be as high as $725,073 if any additional analyses required by the bill are conducted in-house or as high as $2.1 million if the additional work is outsourced. The FDLE arrives at this calculation by assuming that 6% of inmates who pled guilty would petition the court for DNA testing of evidence. This would result in 3,483 additional DNA analyses[26]. The 6% assumption is based on the approximate percentage of inmates who are eligible under current law and have requested DNA testing. Current law only allows inmates who did not plead guilty to request DNA testing.

The FDLE then calculates need for additional resources of 4.8 FTE and $725,073 for salaries, expenses and additional lab equipment needed to process the estimated 3,483 additional cases. The $2.1 million upper estimate for outsourcing assumes $3,000 per analysis by a private lab.

FDLE staff indicates, however, that these two figures represent the upper extreme. There are a number of factors that could impact the assumption that 6% of the newly eligible inmates would actually request and be granted testing of DNA evidence:

- There is no evidence to suggest that inmates who admitted guilt would be as likely to request DNA testing as those who maintained their innocence throughout court proceedings.
- There is no way to know how many newly eligible inmates would have DNA evidence available to be tested. In addition to cases where there was never DNA evidence collected, local jurisdictions often destroy evidence once a sentence is imposed.
- According to FDLE staff, it has become common practice to test evidence containing DNA during the criminal investigation. It is not known whether courts would allow subsequent DNA testing of evidence that has already been tested if the initial test was conclusive.

Based on the necessity to make assumptions with very little supporting data, the fiscal impact on the FDLE is indeterminate.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution, because it is a criminal law.

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[24] Per the Florida Association of Court Clerks and Comptrollers (FACC), the clerk is required to preserve evidence in a criminal case "virtually forever—law requires clerks to hold evidence in a criminal case in the event there could potentially be an appeal....there are appeals even on death row." The clerks are fine with the suggested extended timeframes in the bill. Email from the FACC, October 11, 2005.

[25] FDLE Fiscal Analysis of HB 61 by Representative Quinones, October 26, 2005.

[26] Estimated 58,060 inmates who pled guilty multiplied by 0.06.

2. Other:

SEPARATION OF POWERS: SUBSTANCE VERSUS PROCEDURE

The bill could raise concerns regarding separation of powers.

CONSTITUTIONAL AUTHORITY

Under Article V, Section 2 of the Florida Constitution, the Supreme Court "shall adopt rules of practice and procedure in all courts . . ." The section also authorizes the legislature to repeal court rules of procedure with a two-thirds vote of the membership of both houses.

SEPARATION OF POWERS

Article II, Section 3 of the Florida Constitution provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." The legislature has the exclusive power to enact substantive laws[27] while Article V, section 2 of the Florida Constitution grants the Florida Supreme Court the power to "adopt rules for the practice and procedure in all courts, including the time for seeking appellate review."

Changes to substantive law by court rules of procedure appear to violate the separation of powers provision of the Florida Constitution.[28]

DISTINGUISHING SUBSTANCE FROM PROCEDURE

Generally speaking, "substantive law" involves matters of public policy affecting the authority of government and rights of citizens relating to life, liberty, and property. Court "rules of practice and procedure" govern the administration of courts and the behavior of litigants within a court proceeding. In practice, determining the difference is not simple or clear. In 1973, Justice Adkins described the difference between substance and procedure:

> The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure." Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.[29]

This "twilight zone" remains to this day, and causes, in the analysis of many enactments, a difficult determination of whether a matter is procedural or substantive.

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[27] *See* Art. III, s. 1, Fla. Const.; *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000); *Johnson v. State*, 336 So.2d 93 (Fla. 1976).

[28] *Id.*

[29] *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1973).

DNA TESTING

In 2001, the legislature created a limited statutory right to give defendants in closed criminal cases an additional opportunity to prove their innocence using DNA evidence.[30] It provided a two-year period for pending and future cases that expired on October 1, 2003. Shortly after enactment, the court passed a rule to implement the statute reflecting the statutory deadlines.[31] Prior to the October 1 expiration, the court issued an order temporarily suspending the deadline. In addition, the court ordered government entities to store evidence in all closed criminal cases indefinitely.[32] The opinion of the court suspending the statutory deadline was a four to three decision. Justice Wells said in dissent, ". . . this Court does not have jurisdiction to 'suspend' a provision of a lawfully enacted statute or to mandate that evidence . . . be maintained beyond the period the statute specifically states that the evidence is to be maintained."[33]

In 2004, the legislature further amended the law to extend the period from two to four years and provided for expiration October 1, 2005.[34] In September 2004, the court amended its rule to reflect the statutory changes.[35] The court amended the rule, once again, to extend the deadline from October 1, 2005, to July 1, 2006.[36]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Florida Bar "adopted a legislative position calling for a permanent method for state inmates to seek DNA testing that could exonerate them."[37] The Bar took no position regarding the availability of postconviction DNA testing for those who plead guilty or no contest.[38]

The Florida Innocence Initiative contends that maintenance of evidence is the most critical aspect of preserving a defendant's right to DNA testing.[39]

FDLE recommends that the department receive notice at the time a motion for postconviction DNA testing is filed rather than when it is signed. FDLE staff could then assist the parties and expedite the testing process.[40]

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On October 19, 2005, the Governmental Operations Committee adopted a strike-all amendment and reported the bill favorably with Committee Substitute. The strike-all amendment authorizes postconviction DNA testing of any person convicted of a felony and sentenced, at any time, rather than limiting testing to those persons maintaining their innocence. The strike-all amendment removes the authorization for early disposal of physical evidence by governmental entities.

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[30] *See* s. 925.11, F.S.; ch. 2001-197, L.O.F.
[31] *See Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853*, 807 So.2d 633 (Fla. 2001).
[32] *See Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A) (Postconviction DNA Testing)*, 857 So.2d 190 (Fla. 2003).
[33] Justice Wells was joined by Justices Cantero and Bell. Comments of the Criminal Court Steering Committee, October 13, 2003, at 8 and 9 n.33, (citing Wells, J., dissenting in *Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A)*).
[34] *See* ch. 2004-67, L.O.F.
[35] *See* 884 So.2d 934.
[36] *See Amendments to Florida Rule of Criminal Procedure 3.853(D)*, SC05-1702 (September 29, 2005).
[37] Blankenship, G. "Bar supports permanent DNA reforms," *The Florida Bar News*, September 15, 2005.
[38] *Id.*
[39] Pudlow, J. "Momentum builds for extending DNA testing," *The Florida Bar News*, September 1, 2005.
[40] FDLE Analysis of HB 61, "Issues Related to FDLE," October 26, 2005.

CHAMBER ACTION

The Governmental Operations Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to the postsentencing testing of DNA evidence; amending s. 925.11, F.S.; revising the circumstances under which a person who has been sentenced for committing a felony may petition the court for postsentencing testing of DNA evidence; abolishing certain time limitations imposed upon such testing; authorizing a governmental entity to dispose of physical evidence if the sentence imposed has expired and another law or rule does not require that the evidence be retained; providing for retroactive application; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 925.11, Florida Statutes, is amended to read:

925.11 Postsentencing DNA testing.--

(1) PETITION FOR EXAMINATION.--

(a) A person who has been convicted of a felony and sentenced for committing that offense ~~tried and found guilty of committing a crime and has been sentenced~~ by a court established by the laws of this state may petition that court to order the examination of physical evidence collected at the time of the investigation of the crime for which he or she has been sentenced which may contain DNA (deoxyribonucleic acid) and which would exonerate that person or mitigate the sentence that person received.

(b) A petition for postsentencing DNA testing may be filed or considered at any time following the date that the judgment and sentence in the case becomes final. ~~Except as provided in subparagraph 2., a petition for postsentencing DNA testing may be filed or considered:~~

~~1. Within 4 years following the date that the judgment and sentence in the case becomes final if no direct appeal is taken, within 4 years following the date that the conviction is affirmed on direct appeal if an appeal is taken, within 4 years following the date that collateral counsel is appointed or retained subsequent to the conviction being affirmed on direct appeal in a capital case, or by October 1, 2005, whichever occurs later; or~~

~~2. At any time if the facts on which the petition is predicated were unknown to the petitioner or the petitioner's attorney and could not have been ascertained by the exercise of due diligence.~~

(2) METHOD FOR SEEKING POSTSENTENCING DNA TESTING.--

(a) The petition for postsentencing DNA testing must be made under oath by the sentenced defendant and must include the following:

1. A statement of the facts relied on in support of the petition, including a description of the physical evidence containing DNA to be tested and, if known, the present location or the last known location of the evidence and how it was originally obtained;

2. A statement that the evidence was not previously tested for DNA or a statement that the results of any previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques would likely produce a definitive result;

3. A statement that the sentenced defendant is innocent and how the DNA testing requested by the petition will exonerate the defendant of the crime for which the defendant was sentenced or will mitigate the sentence received by the defendant for that crime;

4. A statement that identification of the defendant is a genuinely disputed issue in the case, and why it is an issue;

5. Any other facts relevant to the petition; and

6. A certificate that a copy of the petition has been served on the prosecuting authority.

(b) Upon receiving the petition, the clerk of the court shall file it and deliver the court file to the assigned judge.

(c) The court shall review the petition and deny it if it is insufficient. If the petition is sufficient, the prosecuting

authority shall be ordered to respond to the petition within 30 days.

(d) Upon receiving the response of the prosecuting authority, the court shall review the response and enter an order on the merits of the petition or set the petition for hearing.

(e) Counsel may be appointed to assist the sentenced defendant if the petition proceeds to a hearing and if the court determines that the assistance of counsel is necessary and makes the requisite finding of indigency.

(f) The court shall make the following findings when ruling on the petition:

1. Whether the sentenced defendant has shown that the physical evidence that may contain DNA still exists;

2. Whether the results of DNA testing of that physical evidence would be admissible at trial and whether there exists reliable proof to establish that the evidence has not been materially altered and would be admissible at a future hearing; and

3. Whether there is a reasonable probability that the sentenced defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

(g) If the court orders DNA testing of the physical evidence, the cost of such testing may be assessed against the sentenced defendant unless he or she is indigent. If the sentenced defendant is indigent, the state shall bear the cost of the DNA testing ordered by the court.

(h) Any DNA testing ordered by the court shall be carried out by the Department of Law Enforcement or its designee, as provided in s. 943.3251.

(i) The results of the DNA testing ordered by the court shall be provided to the court, the sentenced defendant, and the prosecuting authority.

(3) RIGHT TO APPEAL; REHEARING.--

(a) An appeal from the court's order on the petition for postsentencing DNA testing may be taken by any adversely affected party.

(b) An order denying relief shall include a statement that the sentenced defendant has the right to appeal within 30 days after the order denying relief is entered.

(c) The sentenced defendant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief. The time for filing an appeal shall be tolled until an order on the motion for rehearing has been entered.

(d) The clerk of the court shall serve on all parties a copy of any order rendered with a certificate of service, including the date of service.

(4) PRESERVATION OF EVIDENCE.--

(a) Governmental entities that may be in possession of any physical evidence in the case, including, but not limited to, any investigating law enforcement agency, the clerk of the court, the prosecuting authority, or the Department of Law Enforcement shall maintain any physical evidence collected at

the time of the crime for which a postsentencing testing of DNA may be requested.

(b) ~~Except for a case in which the death penalty is imposed, the evidence shall be maintained for at least the period of time set forth in subparagraph (1)(b)1.~~ In a case in which the death penalty is imposed, the evidence shall be maintained for 60 days after execution of the sentence. In all other cases, a governmental entity may dispose of the physical evidence if the term of the sentence imposed in the case has expired and

~~(c) A governmental entity may dispose of the physical evidence before the expiration of the period of time set forth in paragraph (1)(b) if all of the conditions set forth below are met.~~

~~1. The governmental entity notifies all of the following individuals of its intent to dispose of the evidence: the sentenced defendant, any counsel of record, the prosecuting authority, and the Attorney General.~~

~~2. The notifying entity does not receive, within 90 days after sending the notification, either a copy of a petition for postsentencing DNA testing filed pursuant to this section or a request that the evidence not be destroyed because the sentenced defendant will be filing the petition before the time for filing it has expired.~~

~~3.~~ no other provision of law or rule requires that the physical evidence be preserved or retained.

Section 2. This act shall take effect upon becoming a law and shall apply retroactively to October 1, 2005.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 125 CS Voter Registration
SPONSOR(S): Evers and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 208

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Ethics & Elections Committee	8 Y, 2 N, w/CS	West	Mitchell
2) Agriculture & Environment Appropriations Committee	9 Y, 0 N	Davis	Dixon
3) State Administration Council		West	Bussey
4)			
5)			

SUMMARY ANALYSIS

HB 125 CS requires commercial subagents of the Fish and Wildlife Conservation Commission (FWCC) that sell resident hunting, fishing, combination licenses or trapping permits to offer voter registration applications to those purchasing a license or permit. The subagents are prohibited from assisting people with the voter registration application or collecting completed applications.

The FWCC will be required to have a link to a voter registration application form on its agency website. Within seven days of receiving a request for an application, the Commission is required to provide, to the appropriate supervisor of elections, a list of the names and addresses of those people that would like to have a voter registration form sent to them. Providing Internet access to this information may satisfy these requirements.

County supervisors of elections must obtain, at least every five days, a list of persons who have requested voter registration applications in the course of applying for a hunting and fishing license and send them voter registration forms by mail. Similarly, providing Internet access to this information may satisfy this requirement.

HB 125 CS does not appear to have an impact on state revenues or expenditures.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty
This bill would require private company employees to distribute voter registration applications or face civil penalties. Because of personal belief, some individuals may not want to be involved in voter registration activities.

B. EFFECT OF PROPOSED CHANGES:

HB 125 CS enhances the opportunities of Florida residents to register to vote and keep their registration current. HB 125 CS requires commercial subagents of the FWCC that sell resident hunting, fishing, combination licenses or trapping permits to offer voter registration applications to persons who purchase a license or permit. Currently, there are 680 subagents that sell hunting, fishing or trapping licenses or permits in Florida. Of these, 174 are Wal-Mart stores.

County supervisors of elections would be responsible for sending the appropriate number of voter registration applications to the subagents. Supervisors would also be responsible for visiting the FWCC website and based upon a person's address, identifying persons to whom they are required to send a voter registration application. In the case where a zip code crosses a county boundary, the affected supervisors of both counties may send a voter registration application to someone requesting it through the FWCC website.

So long as FWCC subagents do not offer in any way to solicit or collect voter registration applications from an applicant, they will not be deemed a "third party voter registration organization" as provided in s. 97.027(36), F.S., or a "voter registration agency" as provided in s. 97.021(40)[1], F.S.

Two other states, Montana and Georgia, have recently considered similar legislation. In 2005, HB 712 was filed in Montana. The bill would have required any site where license fees were accepted to also provide voter registration applications, and would have exempted these sites from being considered voter registration agencies. HB 712 died in committee.

In Georgia, SB 541 was enacted and recently signed into law. The bill requires most places where fish and wildlife licenses are sold to also conduct voter registration. Georgia adopted an approach that is similar to Florida's approach with regard to voter registration at driver's licenses offices and motor voter. Under the new law, the additional information needed for voter registration is added to the fish and wildlife license application and if the person wants to register, this additional information is included. The information is then transmitted electronically or on the proper application to the Secretary of State on a daily basis. Persons selling licenses are considered deputy registrars and are subject to similar restrictions for political activity as voter registration agencies in Florida.

Except as otherwise provided therein, the bill is effective upon becoming a law.

C. SECTION DIRECTORY:

Section 1.

[1] Section 97.021(40), F.S., defines "voter registration agency" as "any office that provides public assistance, any office that serves persons with disabilities, any center for independent living, or any public library."

- Requires supervisors of elections to supply voter registration applications to the FWCC.

Section 2.

- Requires places that sell hunting, fishing or trapping licenses or permits to make available voter registration applications.
- Clarifies that the FWCC and its subagents are not voter registration agencies or third-party registration organizations.

Section 3.

- Effective October 1, 2006.
- If a person indicates when buying a license that he or she would like a voter registration application, this information will be made available to the supervisor of elections who will then send a voter registration application to the person.
- The FWCC may meet its responsibility to provide voter registration applications by making registration information available to supervisors of elections on an internet website.
- Provides that the FWCC will include a link to a voter registration application on its website.

Section 4.

- Provides an effective date of upon becoming law except as otherwise expressly provided in the act.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   See fiscal comments below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have an impact on local government revenues.

2. Expenditures:

   The bill does not appear to have an impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

There will be minimal impact on the subagents that must provide the voter registration applications and training on voter registration. The extent of this impact may only be the storage space needed to house voter registration forms.

D. FISCAL COMMENTS:

There would be little, if any, extra expense to the Department of State or supervisors, as they are currently responsible for reaching out to citizens to educate them on voting and elections, and to enhance voter registration opportunities.

The FWCC has expressed its willingness and demonstrated adequate resources to develop the website and other items needed to implement this bill within its current budget and staffing.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to take action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenues in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill creates no new rule making authority for any of the affected agencies. It may require the FWCC to use its current authority to write new rules for the seamless implementation of this bill, pursuant to s. 371.561(8), F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Ethics & Elections Committee adopted a strike-all amendment on January 25, 2006, which substantially modified the bill. The strike-all corrected many of the objections expressed by the Department of State and third parties regarding the bill as originally filed. This analysis reflects the changes incorporated in the committee substitute.

CHAMBER ACTION

The Ethics & Elections Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to voter registration; creating s. 97.05831, F.S.; requiring the supervisor of elections of each county to send voter registration applications to the Fish and Wildlife Commission and its subagents; amending s. 372.561, F.S.; requiring voter registration applications to be displayed at each location where hunting, fishing, or trapping licenses or permits are sold; requiring that applicants for hunting, fishing, or trapping licenses or permits be asked if they would like a voter registration application; requiring certain information to be provided when a person applies for a hunting, fishing, or trapping license or permit on the Internet; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 97.05831, Florida Statutes, is created to read:

97.05831 Voter registration applications made available to the Fish and Wildlife Conservation Commission.--As required in s. 372.561, each supervisor of elections shall supply voter registration applications to the Fish and Wildlife Conservation Commission and its subagents, as needed.

Section 2. Subsection (8) of section 372.561, Florida Statutes, is renumbered as subsection (10), and new subsections (8) and (9) are added to that section to read:

372.561 Recreational licenses, permits, and authorization numbers to take wild animal life, freshwater aquatic life, and marine life; issuance; costs; reporting.--

(8) At each location where hunting, fishing, or trapping licenses or permits are sold, voter registration applications shall be displayed and made available to the public. Subagents shall ask each person who applies for a hunting, fishing, or trapping license or permit if he or she would like a voter registration application and may provide such application to the license or permit applicant but shall not assist such persons with voter registration applications or collect complete or incomplete voter registration applications.

(9) When acting in its official capacity pursuant to this section, neither the commission nor a subagent is deemed a third-party registration organization, as defined in s. 97.021(36), or a voter registration agency, as defined in s. 97.021(40), and is not authorized to solicit, accept, or collect voter registration applications or provide voter registration services.

Section 3. Effective October 1, 2006, subsection (9) of section 372.561, Florida Statutes, as created by this act, is renumbered as subsection (11), subsection (10) of that section is renumbered as subsection (13), and new subsections (9), (10), and (12) are added to that section to read:

372.561 Recreational licenses, permits, and authorization numbers to take wild animal life, freshwater aquatic life, and marine life; issuance; costs; reporting.--

(9) Except as provided in subsections (8) and (12), each person who applies for a hunting, fishing, or trapping license or permit shall be asked if he or she would like the appropriate supervisor of elections to provide a voter registration application to the applicant at a later date. If at the time a license is purchased the applicant indicates that he or she would like to receive a voter registration application, the commission shall, within 7 days, make the request available to the appropriate supervisor of elections or voter registration agency so that an application may be sent to the applicant. Supervisors of elections shall mail an application to each person requesting such application within 5 business days after receipt of the request.

(10) The commission may satisfy the requirements of subsection (9) by providing access to an Internet site with the voter registration information included thereon.

(12) Each person who applies for a hunting, fishing, or trapping license or permit on the Internet shall be provided a link to the Department of State's online uniform statewide voter registration application.

Section 4. Except as otherwise expressly provided in this act, this act shall take effect upon becoming a law.

HB 573

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 573 Disabled Veterans
SPONSOR(S): Bilirakis and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1342

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Military & Veteran Affairs Committee	7 Y, 0 N	Marino	Cutchins
2) Local Government Council	8 Y, 0 N	Smith	Hamby
3) Finance & Tax Committee	9 Y, 0 N	Rice	Diez-Arguelles
4) State Administration Council		Marino	Bussey
5)			

SUMMARY ANALYSIS

Under current law, certain disabled veterans are exempt from local government license and permit fees associated with making a mobile home owned and occupied by the veteran wheelchair accessible.

House Bill 573 expands this exemption to include any dwelling owned and occupied by the veteran.

The Revenue Estimating Conference has not produced an estimate of this bill. The fiscal impact on local government revenues is expected to be negative and insignificant.

This bill takes effect July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Ensure lower taxes – House Bill 573 allows more 100-percent, service-connected permanently and totally disabled wheelchair-confined veterans to take advantage of an existing building permit fee exemption.

Safeguard individual liberty – This bill allows more 100-percent, service-connected permanently and totally disabled veterans confined to wheelchairs greater freedom to conduct their own affairs by reducing the cost to make their homes wheelchair habitable.

Empower families – This bill allows more 100-percent, service-connected permanently and totally disabled wheelchair-confined veterans improved family life by removing physical barriers that degrade their integration into their home.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Florida Building Code

Section 553.79, F.S. requires that any person or organization seeking to construct, modify, or demolish a building in Florida must obtain a permit from the appropriate Florida Building Code enforcing agency. Local governments, under ss. 125.56, 166.222, and 553.80 are charged with regulating building construction and are authorized to charge reasonable permit fees to defray building regulation, enforcement, and administrative costs. In the case of remodeling permits, the fee structure generally includes a base or application fee, plus an additional amount based on the construction value of the remodeling project. The table below shows current remodeling permit fee valuations from a county and a municipality:

Remodeling Permit Fees			
Broward County	City of Tallahassee		
	Construction Value	Application Fee	Valuation Fee
Minimum base permit fee $111 added to a charge calculated at a rate of 1.60% of the remodeling job construction value.	$10,000 or less	$60	$14/$1000
	50K or less	240	1.20/1000
	100K or less	288	0.38/1000
	Over 100K	326	0.38/1000

License and Fee Exemption

Section 295.16, F.S., allows veterans to be exempt from paying building license or permit fees to any county or municipality for wheelchair accessibility improvements made upon a mobile home, provided the following criteria are met:

- The veteran must be a resident of Florida;
- The veteran must be permanently and totally disabled and be able to show:
  - A valid identification card issued by the Florida Department of Veterans' Affairs under s. 295.17, F.S.;
  - A service-connected 100-percent disability rating for compensation as determined by the United States Department of Veterans' Affairs; or
  - A disability retirement pay receipt from any branch of the uniformed armed services for a 100-percent, service-connected disability rating;

- The veteran must be honorably discharged from the Armed Forces;
- The veteran must own and reside in the mobile home for which the improvements are being made; and
- The veteran may only make improvements to his or her mobile home such as adding ramps, widening doorways, and similar improvements for the purpose of making the mobile home wheelchair-habitable.

Typical improvements or alterations[1] that may need to be made in order to make a mobile home more habitable for an eligible wheelchair-confined veteran include, but are not limited to:

- Outside: ramps, railings, primary entrance with widened doorway into home;
- Inside: ramps, railings, widened doorways, lowered countertops, wheelchair turning space, wheelchair lifts, toilet and bathing facilities, clear floor space to reach appliances.

Section 295.16, F.S., does not appear to place restrictions on the number of wheelchair accessibility improvements allowed nor does it appear to place any restriction on the number of times improvements may be made to the mobile home. Additionally, it does not appear to remove the requirement for obtaining a permit for the improvements as in s. 553.79, F.S.

Disabled Veteran ID Card and License Plate

Section 295.17, F.S., provides that the Florida Department of Veterans' Affairs (DVA) may issue a photo-identification card to any veteran who is a permanent resident of the state and who has been determined by the U.S. Department of Veterans' Affairs (USDVA) or its predecessor to have a 100-percent, service-connected permanent and total disability rating for compensation, or who has been determined to have a service-connected disability rating of 100-percent and is in receipt of disability retirement pay from any branch of the uniformed armed services. The ID card eligible veteran may request the card in writing to the DVA, and, upon its receipt, the veteran may use the card as proof of identification for all benefits provided by state law for 100-percent, service-connected permanently and totally disabled veterans except for certain benefits relating to property tax exemptions.

It should be noted that not all 100-percent, service-connected, permanently and totally disabled veterans are confined to wheelchairs. For example, a veteran could be rated with a 100-percent permanent and total disability for post-traumatic stress disorder, yet not require a wheelchair. In addition, not all wheelchair-confined veterans are 100-percent, service-connected, permanently and totally disabled.

Under s. 320.084(2), F.S., a veteran who produces a DVA ID card, as provided for in s. 295.17, F.S., to the Florida Department of Highway Safety and Motor Vehicles (DHSMV) shall be issued one free motor vehicle license plate for use on any motor vehicle owned or leased by the veteran. Since each veteran who receives this benefit is limited to one free license plate and each veteran who qualifies for this benefit is likely to use it, this statute provides a means to estimate the number of 100-percent, service-connected permanent and totally disabled veterans living in Florida. According to the DHSMV, as of January 11, 2006, there were 4,556 disabled veteran wheelchair license plates issued in the state[2].

Effect of Proposed Change:

House Bill 573 increases the type of residences eligible for the permit fee exemption in s. 295.16, F.S. In addition to mobile homes, eligible disabled veterans may also apply this exemption to any dwelling they own and occupy.

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[1] Architectural and Transportation Barriers Compliance Board. ADA and ABA Accessibility Guidelines for Buildings and Facilities. Federal Register. July 23, 2004 and amended August 5, 2005.

[2] Communication with Steve Fielder of the Florida Department of Highway Safety and Motor Vehicles. January 13, 2006. Email on file with Committee on Military and Veteran Affairs.

In addition to dealing with physical, emotional, and possibly employment/income-related limitations, wheelchair bound veterans often face other financial restrictions as they transition back into family life and society. The provisions of this bill will enable a larger population of eligible, disabled veterans to take advantage of the existing fee exemption, reducing the costs that they are obligated to pay in order to make their homes wheelchair accessible. Providing this benefit to a broader population of veterans could assist in addressing the potential increase in needs resulting from continued military operations.

This bill does not appear to place any restrictions on the number of wheelchair accessibility improvements allowed nor does it appear to place any restrictions on the number of times improvements may be made to the dwelling. Additionally, it does not appear to remove the requirement for obtaining a permit for the improvements as in s. 553.79, F.S.

C. SECTION DIRECTORY:

Section 1. Amends s. 295.16, F.S., relating to disabled veterans; replacing "mobile home" with "dwelling".

Section 2. Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The fiscal impact on local government revenues is expected to be negative and insignificant. The Revenue Estimating Conference has not met on this issue.

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Although this bill reduces revenue-raising authority, the number of applicable veterans likely to utilize the license and permit fee exemptions is expected to be minimal. Therefore, the fiscal impact is expected to be insignificant and the bill is exempt from the mandates provision.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

A bill to be entitled

An act relating to disabled veterans; amending s. 295.16, F.S.; expanding exemption from certain fees relating to structural improvements to a disabled veteran's residence; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 295.16, Florida Statutes, is amended to read:

295.16 Disabled veterans exempt from certain license or permit fee.--No totally and permanently disabled veteran who is a resident of Florida and honorably discharged from the Armed Forces, who has been issued a valid identification card by the Department of Veterans' Affairs in accordance with s. 295.17 or has been determined by the United States Department of Veterans Affairs or its predecessor to have a service-connected 100-percent disability rating for compensation, or who has been determined to have a service-connected disability rating of 100 percent and is in receipt of disability retirement pay from any branch of the uniformed armed services~~,~~ shall be required to pay any license or permit fee, by whatever name known, to any county or municipality in order to make improvements upon a dwelling ~~mobile home~~ owned by the veteran which is used as the veteran's residence, provided such improvements are limited to ramps, widening of doors, and similar improvements for the purpose of making the dwelling ~~mobile home~~ habitable for veterans confined to wheelchairs.

Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 631 CS World War II Permanently Disabled Veterans' Discount on Homestead Ad Valorem Tax
SPONSOR(S): Sansom and others
TIED BILLS: **IDEN./SIM. BILLS:** SJR 194

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Military & Veteran Affairs Committee	7 Y, 0 N	Marino	Cutchins
2) Finance & Tax Committee	9 Y, 0 N, w/CS	Monroe	Diez-Arguelles
3) State Administration Council		Marino	Bussey
4)			
5)			

SUMMARY ANALYSIS

House Joint Resolution 631, if approved by the electorate, would allow certain disabled veterans of World War II to receive a discount from the amount of the ad valorem tax otherwise owed on homestead property. In order to qualify for this discount, the World War II veteran must demonstrate:

- He or she was a Florida resident at the time of entering the military service;
- The disability was combat-related; and
- The veteran was honorably discharged upon separation from military service.

The amount of the discount is a percentage equal to the percentage of the veteran's permanent, combat-related disability, as determined by the U.S. Department of Veterans Affairs. For example, a veteran with a 70 percent disability would receive a 70 percent discount on their ad valorem tax bill.

The Division of Elections estimates the cost to the state to be approximately $50,000 to meet constitutional requirements to publish this joint resolution to the electorate. In addition, the Revenue Estimating Conference has estimated that the recurring fiscal impact to local governments will be ($1.0) million, assuming no change in millage rates.

This constitutional amendment, if approved, would take effect December 7, 2006, be self-executing, and not need implementing legislation.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Ensure Lower Taxes - This joint resolution lowers taxes for certain disabled World War II veterans by allowing them to take a discount on their homestead property tax based on the percentage of their disability as determined by the United States Department of Veteran's Affairs.

B. EFFECT OF PROPOSED CHANGES:

Present Situation:

Property Tax Exemptions for Disabled Veterans

The Legislature may only grant property tax exemptions that are authorized in the constitution, and modifications to property tax exemptions must be consistent with the constitutional provision authorizing the exemption. Article VII, Section 3(b) of the State Constitution authorizes the Legislature to enact homestead exemptions "to every widow or widower or person who is blind or totally and permanently disabled." Chapter 196, F.S., establishes a number of homestead property tax exemptions for permanently and totally disabled veterans and, in some cases, their spouses.

Section 196.081, F.S., provides an exemption from taxation on homesteads owned by certain veterans who received a disability or died as a result of their military service. The surviving un-remarried spouses may receive this tax exemption upon the death of such veterans. The Department of Revenue (DOR) reported that in 2005, 30,080[1] parcels of property received this exemption.

Section 196.091, F.S., provides an exemption from taxation on homesteads owned by certain ex-service members who have a service-connected total disability and are confined to a wheelchair. The surviving un-remarried spouses may receive this homestead tax exemption upon the death of such ex-service members as long as they reside on that property. The DOR reported that in 2005, 240[2] parcels of property were exempted through this statute.

Section 196.24, F.S., provides a reduction of $5,000 off property values for homesteads owned by certain ex-service members who are disabled at a rate of 10% or more provided such disability occurred during wartime or through misfortune. The surviving un-remarried spouses may receive this property value reduction upon the death of such ex-service members if they had been married for 5 years. The DOR reported that in 2005, 89,583[3] parcels of property received this exemption.

Effect of Proposed Changes:

This joint resolution would allow certain partially disabled veterans of World War II to receive a discount from the amount of the ad valorem tax otherwise owed on homestead property. In order to qualify for this discount, the World War II veteran must demonstrate:

- He or she was a Florida resident at the time of entering the military service;
- The disability was combat-related; and
- The veteran was honorably discharged upon separation from military service.

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[1] Communication with Brian Jacobik, Florida Department of Revenue. February 10, 2006. Email on file with Committee on Military & Veteran Affairs.
[2] Id.
[3] Id.

The amount of the discount is a percentage equal to the percentage of the veteran's permanent, combat-related disability, as determined by the U.S. Department of Veterans Affairs. For example, a veteran with a 70 percent disability would receive a 70 percent discount on their ad valorem tax bill.

Applicants for this discount are required to submit documentation supporting their eligibility to the county property appraiser by March 1. Required documentation includes the following:

- Proof of residency at the time of entering military service;
- Proof that the injury was combat-related; an official letter from the United States Department of Veteran's Affairs stating the percentage of the veteran's permanent disability; and
- A copy of the veteran's honorable discharge.

The joint resolution provides that if the property appraiser denies the request for a discount, the appraiser must notify the applicant in writing of the reasons for the denial, and the veteran may reapply. The Legislation further provides that the Legislature may, by General Law, waive the annual application requirement for the exemption in subsequent years.

The joint resolution provides ballot language and specifies that the amendment shall be submitted to the electors of Florida at the next general election or at an earlier special election specifically authorized for that purpose.

The DOR reported that in 2005, 89,583 partially disabled veterans used the reduction of property value provided in s. 196.24, F.S. The number of partially disabled veterans that would qualify for this joint resolution would be from this population. Since, the 89,583 includes veterans of all conflicts, the number of partially disabled World War II veterans, as specified in this joint resolution, would be a small portion of this number.

This constitutional amendment, if approved, would take effect December 7, 2006, be self-executing, and not need implementing legislation.

C. SECTION DIRECTORY:

Not Applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This joint resolution does not appear to have a fiscal impact on state revenues.

2. Expenditures:

Non-Recurring	**FY 2006-07**
Department of State, Division of Elections Publications Costs[4]	$50,000[5]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

[4] *See* Art. XI, Sec. 5(d), Fla. Const.

[5] Communication with Logan Mitchell, Department of State Division of Elections. February 10, 2006.

The Revenue Estimating Conference has estimated that the recurring fiscal impact of this constitutional amendment to local governments will be ($1.0) million, assuming no change in millage rates.

2. Expenditures:

This joint resolution does not appear to have a fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The table below shows what eligible disabled veterans saved in 2005 off their property taxes based on the current statutes and numbers provided by the DOR.

2005 Ad valorem Tax Exemptions for Certain Disabled Veterans*	Exemption Value[6]**	Parcels[7]**	Average Exemption Value per Veteran	Average Savings per Veteran
Section 196.081, F.S.: Total Exemption	$3,285,135,432	30,080	$109,213	$2,140
Section 196.091, F.S.: Total Exemption	37,981,598	240	158,256	3,101
Section 196.24, F.S.: $5,000 off property value		89,583	5,000	98

* using statewide average millage rate of 19.6mills[8]
**total statewide

Those partially disabled World War II veterans that this joint resolution would benefit could, depending on the extent of their disability rating, save hundreds of dollars a year on their homestead property taxes. For example, using the average exemption value of $109,213 per veteran in 2005 under s. 196.081, F.S., from the chart above, a disabled veteran with a 50-percent disability rating from the U.S. Department of Veteran's Affairs could be estimated to save approximately $825[9].

D. FISCAL COMMENTS:

Article XI, s. 5(d) of the State Constitution requires the state to publish the proposed amendment along with notice of the date of the election at which it will be submitted before electors in one newspaper in each county in which a newspaper is published once in the tenth week and once in the sixth week immediately preceding the week the election is held. The Division of Elections estimates this cost to be approximately $50,000[10] to meet the requirements of this provision.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provisions of Article VII, section 18 of the Florida Constitution do not apply to joint resolutions.

2. Other:

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[6] Communication with Brian Jacobik, Florida Department of Revenue. February 10, 2006. Email on file with Committee on Military & Veteran Affairs.
[7] Id.
[8] Id.
[9] (($109,213 (avg. home value)-$25,000 (homestead tax exemption))X 19.6 mills) X 50% (disability rating) = $825 savings

[10] Communication with Logan Mitchell, Department of State Division of Elections. February 10, 2006.

Article XI, s. 1 of the Florida Constitution, provides the Legislature the authority to propose amendments to the constitution by joint resolution approved by three-fifths of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office or may be placed at a special election held for that purpose.

This constitutional amendment, if approved, would take effect December 7, 2006, be self-executing, and not need implementing legislation.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 22, 20006, the Finance and Tax Committee adopted one amendment to this bill. First, the amendment added a provision to allow the Legislature, by General Law, to waive the annual application requirement for the exemption in subsequent years. Second, the deadline for the application was changed from "at least 180 days before the scheduled mailing of the current year's property tax notice" to March 1, in order to improve clarity.

CHAMBER ACTION

The Finance & Tax Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

House Joint Resolution

A joint resolution proposing an amendment to Section 6 of Article VII of the State Constitution, relating to homestead exemptions from ad valorem taxation, to provide a discount from the amount of ad valorem taxation levied on the homestead of a World War II veteran who meets specified criteria.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 6 of Article VII of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE VII

FINANCE AND TAXATION

SECTION 6. Homestead exemptions.--

(a) Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of five thousand dollars, upon establishment of right thereto in the manner prescribed by law. The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years.

(b) Not more than one exemption shall be allowed any individual or family unit or with respect to any residential unit. No exemption shall exceed the value of the real estate assessable to the owner or, in case of ownership through stock or membership in a corporation, the value of the proportion which the interest in the corporation bears to the assessed value of the property.

(c) By general law and subject to conditions specified therein, the exemption shall be increased to a total of twenty-five thousand dollars of the assessed value of the real estate for each school district levy. By general law and subject to conditions specified therein, the exemption for all other levies may be increased up to an amount not exceeding ten thousand dollars of the assessed value of the real estate if the owner has attained age sixty-five or is totally and permanently

disabled and if the owner is not entitled to the exemption provided in subsection (d).

(d) By general law and subject to conditions specified therein, the exemption shall be increased to a total of the following amounts of assessed value of real estate for each levy other than those of school districts: fifteen thousand dollars with respect to 1980 assessments; twenty thousand dollars with respect to 1981 assessments; twenty-five thousand dollars with respect to assessments for 1982 and each year thereafter. However, such increase shall not apply with respect to any assessment roll until such roll is first determined to be in compliance with the provisions of section 4 by a state agency designated by general law. This subsection shall stand repealed on the effective date of any amendment to section 4 which provides for the assessment of homestead property at a specified percentage of its just value.

(e) By general law and subject to conditions specified therein, the Legislature may provide to renters, who are permanent residents, ad valorem tax relief on all ad valorem tax levies. Such ad valorem tax relief shall be in the form and amount established by general law.

(f) The legislature may, by general law, allow counties or municipalities, for the purpose of their respective tax levies and subject to the provisions of general law, to grant an additional homestead tax exemption not exceeding twenty-five thousand dollars to any person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner and who has attained age sixty-five and

whose household income, as defined by general law, does not exceed twenty thousand dollars. The general law must allow counties and municipalities to grant this additional exemption, within the limits prescribed in this subsection, by ordinance adopted in the manner prescribed by general law, and must provide for the periodic adjustment of the income limitation prescribed in this subsection for changes in the cost of living.

(g) Each veteran of World War II who is partially or totally permanently disabled shall receive a discount from the amount of the ad valorem tax otherwise owed on homestead property the veteran owns and resides in if the disability was combat-related, the veteran was a resident of this state at the time of entering the military service of the United States, and the veteran was honorably discharged upon separation from military service. The discount shall be in a percentage equal to the percentage of the veteran's permanent, combat-related disability as determined by the United States Department of Veterans Affairs. To qualify for the discount granted by this subsection, an applicant must submit to the county property appraiser, by March 1, proof of residency at the time of entering military service, proof that the disability was combat-related, an official letter from the United States Department of Veterans Affairs stating the percentage of the veteran's permanent disability, and a copy of the veteran's honorable discharge. If the property appraiser denies the request for a discount, the appraiser must notify the applicant in writing of the reasons for the denial, and the veteran may reapply. By general law, the Legislature may waive the annual application

requirement in subsequent years. This subsection shall take effect December 7, 2006, is self-executing, and does not require implementing legislation.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE VII, SECTION 6

WORLD WAR II PERMANENTLY DISABLED VETERANS' DISCOUNT ON HOMESTEAD AD VALOREM TAX.--Proposing an amendment to the State Constitution to provide a discount from the amount of ad valorem tax on the homestead of a partially or totally permanently disabled veteran of World War II who was a Florida resident at the time of entering military service, whose disability was combat-related, and who was honorably discharged; to specify the percentage of the discount as equal to the percentage of the veteran's permanent combat-related disability; to specify qualification requirements for the discount; to authorize the Legislature to waive the annual application requirement in subsequent years by general law; and to specify that the provision takes effect December 7, 2006, is self-executing, and does not require implementing legislation.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 687 CS Public Records
SPONSOR(S): Adams and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1162

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Governmental Operations Committee	5 Y, 2 N, w/CS	Williamson	Williamson
2) Agriculture Committee	9 Y, 0 N	Kaiser	Reese
3) State Administration Council		Williamson	Bussey
4)			
5)			

SUMMARY ANALYSIS

In late 2005, an Orlando television station published on its website personal information regarding holders of a concealed weapon license. The television station along with members of the Florida Legislature received numerous complaints concerning the Internet publication of such information.

The bill creates a public records exemption for personal identifying information of an individual who has applied for or received a license to carry a concealed weapon or firearm. It authorizes the release of the information under certain circumstances. The bill provides for future review and repeal of the exemption and provides a statement of public necessity.

The bill does not grant rule-making authority to any administrative agency.

The bill could have a minimal fiscal impact on state government. It does not appear to have a fiscal impact on local governments.

The bill requires a two-thirds vote of the members present and voting for passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill decreases access to public records.

B. EFFECT OF PROPOSED CHANGES:

Background

Current law authorizes the Department of Agriculture and Consumer Services (department) to issue licenses to carry concealed weapons or concealed firearms[1] to qualified persons.[2] The license is valid in Florida for five years from the date of issuance. The license must include a color photograph of the licensee. The licensee must carry the license and valid identification at all times when in possession of the concealed weapon or firearm.[3]

An applicant for such license must submit to the department a completed application, a nonrefundable license fee, a full set of fingerprints, a photocopy of a certificate or an affidavit attesting to the applicant's completion of a firearms course, and a full frontal view color photograph[4] of the applicant.[5] The application must include:

- The name, address, place and date of birth, race, and occupation of the applicant;
- A statement that the applicant is in compliance with licensure requirements;
- A statement that the applicant has been furnished with a copy of chapter 790, F.S., relating to weapons and firearms;
- A warning that the application is executed under oath; and
- A statement that the applicant desires a concealed weapon or firearms license as a means of lawful self-defense.[6]

From 2005 to 2006, the department received 30,267 new applications and 34,182 renewal applications. Of those, the department issued 29,235 new licenses and 34,093 renewal licenses.[7]

Information submitted as part of the application process is a public record. In late 2005, an Orlando television station published on its website application information regarding holders of a concealed weapon license. The television station along with members of the Florida Legislature received numerous complaints concerning the Internet publication of such information.

Effect of Bill

The bill creates a public records exemption for personal identifying information of an individual who has applied for or received a license to carry a concealed weapon or firearm. It provides for retroactive application of the public records exemption.

The Division of Licensing of the department must release the information:

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[1] Concealed weapon or concealed firearm means a handgun, electronic weapon or device, tear gas gun, knife, or billie. It does not include a machine gun. Section 790.06(1), F.S.

[2] *Id.*

[3] Violation of s. 790.06(1), F.S., constitutes a noncriminal violation with a penalty of $25. *Id.*

[4] The photograph must be taken within the preceding 30 days. The head, including hair, must measure 7/8 of an inch wide and 1 1/8 inches high. Section 790.06(5)(e), F.S.

[5] Section 790.06(5), F.S.

[6] Section 790.06(4), F.S.

[7] "Concealed Weapon / Firearm Summary Report," viewed February 15, 2006, http://licgweb.doacs.state.fl.us/stats/cw_monthly.html.

- With the written consent of the applicant or licensee or his or her legally authorized representative.
- By court order upon a showing of good cause.
- Upon written request by law enforcement in connection with an active criminal investigation.

The bill provides for future review and repeal of the exemption on October 2, 2011. It also provides a statement of public necessity.

C. SECTION DIRECTORY:

Section 1 creates s. 790.0601, F.S., to create a public records exemption for personal identifying information of an applicant for or holder of a concealed weapon or firearm license.

Section 2 provides a public necessity statement.

Section 3 provides a July 1, 2006, effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   This bill could create a fiscal impact on the Department of Agriculture and Consumer Services (department), because staff responsible for complying with public records requests will require training relating to the newly created public records exemption. In addition, the department could incur costs associated with redacting the confidential and exempt information prior to releasing a record.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

   This bill does not create, modify, amend, or eliminate a local expenditure.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

   Vote Requirement
   Article I, s. 24(c) of the Florida Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public records or public meetings exemption. The bill creates a public records exemption. Thus, it requires a two-thirds vote for passage.

   Public Necessity Statement
   Article I, s. 24(c) of the Florida Constitution, requires a statement of public necessity (public necessity statement) for a newly created public records or public meetings exemption. The bill creates a public records exemption. Thus, it includes a public necessity statement.

B. RULE-MAKING AUTHORITY:

   This bill does not grant rule-making authority to any administrative agency.

C. DRAFTING ISSUES OR OTHER COMMENTS:

   Other Comments: Governmental Operations Committee Meeting
   At the February 22, 2006, meeting of the Governmental Operations Committee members raised concerns regarding access to information made confidential and exempt by the bill. Members were concerned that child protective service workers and local government employees (such as code enforcement officers) would not have access to information regarding whether a person had a license to carry a concealed weapon or firearm. As a means of safety, members believed these employees currently conduct a concealed weapons check prior to going to a residence to perform their lawful duties. In addition, members were concerned that law enforcement officers performing routine traffic stops would not have access to such information because it is unclear whether a traffic stop is an active criminal investigation. Members also were concerned that law enforcement officers conducting a routine traffic stop would experience access delays based upon the time of day an officer might submit the written request. For example, an officer submitting a request between the hours of 8:00 a.m. and 5:00 p.m. might not experience a delay because these are considered normal business hours. An officer submitting a written request at 10:00 p.m. might experience a delay due to the office closing and not reopening until the next business day.

   Other Comments: Public Records Law
   Article I, s. 24(a), Florida Constitution, sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a), Florida Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

   Public policy regarding access to government records is further addressed in the Florida Statutes. Section 119.07(1), F.S., also guarantees every person a right to inspect, examine, and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act[8] provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following public purposes:

[8] Section 119.15, F.S.

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would
- jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 22, 2006, the Governmental Operations Committee adopted a strike-all amendment and reported the bill favorably with committee substitute. The strike-all amendment narrowed the public records exemption by removing the confidentiality for the license number. It removed the exemption for the name, address, and social security number because it was redundant of personal identifying information. In addition, the strike-all amendment provided for retroactive application, conformed the public necessity statement to the public records exemption, and placed the exemption in chapter 790, F.S., which is the weapons and firearms chapter.

CHAMBER ACTION

The Governmental Operations Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to public records; creating s. 790.0601, F.S.; creating an exemption from public records requirements for certain personal identifying information held by the Division of Licensing of the Department of Agriculture and Consumer Services; providing for retroactive application of the exemption; providing for disclosure of such information under specified conditions; providing for review and repeal; providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 790.0601, Florida Statutes, is created to read:

790.0601 Public records exemption for concealed weapons.--

(1) Personal identifying information of an individual who has applied for or received a license to carry a concealed

weapon or firearm pursuant to s. 790.06 held by the Division of Licensing of the Department of Agriculture and Consumer Services is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This exemption applies to such information held by the division before, on, or after the effective date of this section.

(2) Information made confidential and exempt by this section shall be disclosed:

(a) With the express written consent of the applicant or licensee or his or her legally authorized representative.

(b) By court order upon a showing of good cause.

(c) Upon written request by law enforcement in connection with an active criminal investigation.

(3) This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that the personal identifying information of an individual who has applied for or received a license to carry a concealed weapon or firearm held by the Division of Licensing of the Department of Agriculture and Consumer Services be made confidential and exempt from public records requirements, with certain exceptions. The carrying of a concealed weapon in the state by members of the general public requires an individual to obtain a license from the Department of Agriculture and Consumer Services. The applicant for a license to carry a concealed weapon or firearm must state that he or she seeks a concealed

weapon or firearms license as a means of lawful self-defense. The knowledge that someone has applied for or received a license to carry a concealed weapon or firearm can very easily lead to the conclusion that the applicant or licensee has in fact armed himself or herself. This knowledge defeats the purpose behind the authorization to carry a concealed weapon or firearm. If the applicant or licensee had intended for the general public to know he or she was carrying a weapon or firearm, he or she would have applied for a regular weapon or firearms permit rather than a license to carry a concealed weapon or firearm. The Legislature has found in prior legislative sessions and has expressed in s. 790.335(1)(a)3., Florida Statutes, that a record of legally owned firearms or law-abiding firearm owners is "an instrument that can be used as a means to profile innocent citizens and to harass and abuse American citizens based solely on their choice to own firearms and exercise their Second Amendment right to keep and bear arms as guaranteed under the United States Constitution." Release of personal identifying information of an individual who has applied for or received a license to carry a concealed weapon or firearm could be used to harass an innocent person based solely on that person's exercised right to carry a concealed weapon or firearm. Further, such information could be used and has been used to identify individuals who have obtained a license to carry a concealed weapon or firearm for the purpose of making the identity of the applicant or licensee publicly available via traditional media and the Internet. Once again, such public disclosure contradicts the purpose of carrying a concealed weapon or firearm.

Therefore, the Legislature finds that the personal identifying information of an individual who has applied for or received a license to carry a concealed weapon or firearm pursuant to chapter 790, Florida Statutes, must be held confidential and exempt from public records requirements.

Section 3. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1059 Deduction and Collection of a Bargaining Agent's Dues and Uniform Assessments
SPONSOR(S): Rivera
TIED BILLS: **IDEN./SIM. BILLS:** SB 2706

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Governmental Operations Committee	5 Y, 2 N	Brown	Williamson
2) State Administration Council		Brown	Bussey
3)			
4)			
5)			

SUMMARY ANALYSIS

The bill declares that state and local government employers are not required to provide payroll deduction services for a union representing instructional personnel. If an employer agrees, during the collective bargaining process, to provide payroll deduction service for a union representing instructional personnel, the bill limits how such collected dues may be utilized. This bill also creates a cause of action to enforce these limits.

This bill does not appear to have a fiscal impact on state government, and may have a minimal positive fiscal impact to local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill potentially reduces the government's ability to withdraw certain funds from a public employee's salary.

Safeguard individual liberty – The bill potentially increases a public employee's control over certain wages that would otherwise be controlled by the collective bargaining unit representing the employee.

B. EFFECT OF PROPOSED CHANGES:

Background

Article I, Section 6, of the Constitution of the State of Florida declares that "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization." Florida implements this constitutional provision in chapter 447,F.S. Part II of ch. 447, F.S., applies the provision to state and local governments. If a union has been certified as representing a particular group of employees, s. 447.303, F.S., requires a state or local government employer to withhold "dues and uniform assessments" from the paychecks of consenting employees.

Statement of Legislative Intent

The bill provides that state or local government employers are not required to provide payroll deduction services for a union representing instructional personnel.[1] The bill includes a statement of legislative intent that recognizes certain facts about the government's neutrality in the decision of an employee to join or not join a union.[2]

This first section of the legislative statement of intent declares that a government employer's provision of a payroll-withholding mechanism to a collective bargaining unit is inconsistent with the state's larger goal of maintaining neutrality in the employee's decision to join or not join a union. The first section also notes that, while other payroll deductions specifically identify how the funds will eventually be applied,[3] union dues are not required to identify "how the money deducted will be used." The section concludes with a suggestion that, to the extent that employees are currently "unaware of their rights to be refunded any portion of such dues... used for political or social purposes with which they do not agree," the payroll-deduction process may impinge against such employees' rights under the First Amendment.

The second section of the legislative statement begins by emphasizing the size of the collective bargaining unit representing instructional personnel. The section then states that attracting new teachers and retaining existing teachers is a matter of critical importance. The section concludes that due to consolidation, the collective bargaining unit representing teachers has reached the status of a monopoly, thereby unduly restricting its members and impinging on their First Amendment rights.

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[1] The bill references the definition of "instructional personnel" at s. 1012.01, F.S., which defines instructional personnel to include classroom teachers, student personnel services (primarily guidance counselors), librarians and media specialists, other instructional staff, and education paraprofessionals.

[2] Section 447.201, F.S., contains a legislative statement of policy regarding Part II of Chapter 447, F.S. It reads in part, "Nothing herein shall be construed either to *encourage or discourage* organization of public employees." (Emphasis added.)

[3] This is presumably a reference to federal withholding such as federal income tax and Social Security withholding, as well as withholdings related to employee benefits, health plans, retirement plans, or other programs.

The third section of the legislative statement declares that, due to the facts and trends already set forth, the withholding of dues and uniform deductions of instructional personnel should be a matter discussed between the parties as part of the collective bargaining process, rather than an automatic action granted to the collective bargaining unit.

Effect of Bill

The bill removes the authority of the "certified bargaining agent for instructional personnel" to receive automatic deductions under s. 447.303, F.S., and provides that such deductions are instead "proper subject[s] of collective bargaining."

The bill further states that in the event deductions are implemented as a result of the bargaining process, the deductions shall not exceed an amount actually used for bargaining activities of the certified bargaining unit.[4] This amount is distinguished from other potential uses of such fees that may not be deducted from an employee's salary.[5]

The bill requires that, if agreed upon, deductions require the written approval of the employee. The employer may not collect fines, penalties, special assessments, or funds for any purpose other than labor-management issues. The agreement between the employer and the collective bargaining unit also must provide for segregation of labor-management funds or an independent audit of such funds.

Finally, the bill creates a cause of action whereby any taxpayer or aggrieved party may seek injunctive relief for violation of the restrictions on the use of payroll-deducted dues, and may compel the union to make a pro-rata refund to all of its members of monies used for an improper purpose. An individual union member also may seek a refund in his or her own name.

C. SECTION DIRECTORY:

Section 1 amends s. 447.303, F.S., removing the payroll-deduction service for certain unions; limiting the use of such union dues when deduction is agreed upon, and providing a private right of action to enforce the provisions.

Section 2 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   Providing a payroll deduction service for the benefit of a union represents a minimal expense that would be saved should an employer decide to eliminate the service.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not create, modify, amend, or eliminate a local revenue source.

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[4] These permitted uses are referred to later in the bill as "labor-management issues."

[5] Express examples of impermissible activities include electoral activities, contributions to candidates, political parties, political committees, or committees of continual existence.

2. Expenditures:

Providing a payroll deduction service for the benefit of a union represents a minimal expense that would be saved should an employer decide to eliminate the service.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

The bill arguably raises potential federal constitutional concerns, however, the case of *City of Charlotte v. Local 660, International Association of Firefighters*, 426 U.S. 283 (1976) suggests that a government may refuse to offer payroll deduction for union dues, even though it provides for other voluntary payroll deductions, so long as the government provides some reasonable reason for doing so.[6] North Carolina, the location of the *Local 660* case, is a "closed shop" state in which employers can compel union membership of all employees. The reasoning utilized in the court's analysis and opinion appears to be more compelling in a right-to-work state such as Florida.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

[6] As opposed to the stronger constitutional standard of a "compelling governmental interest." In making this determination the court stated at page 2038 of the *Local 660* case:

> Since it is not here asserted and this Court would reject such a contention if it were made that respondents' status as union members or their interest in obtaining a dues checkoff is such as to entitle them to special treatment under the Equal Protection Clause, the city's practice must meet only a relatively relaxed standard of reasonableness in order to survive constitutional scrutiny. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

A bill to be entitled

An act relating to the deduction and collection of a bargaining agent's dues and uniform assessments; amending s. 447.303, F.S.; eliminating a right of certain bargaining agents to have certain dues and assessments deducted and collected by an employer from certain employees; providing legislative findings and intent; providing that the deduction and collection of certain dues and assessments is a proper subject of collective bargaining; providing requirements and limitations; providing for accounting of funds; providing for enforcement; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 447.303, Florida Statutes, is amended to read:

447.303 Dues; deduction and collection.--

(1) Any employee organization which has been certified as a bargaining agent, other than a certified bargaining agent for instructional personnel as defined in s. 1012.01, shall have the right to have its dues and uniform assessments deducted and collected by the employer from the salaries of those employees who authorize the deduction of said dues and uniform assessments. However, such authorization is revocable at the employee's request upon 30 days' written notice to the employer and employee organization. Said deductions shall commence upon the bargaining agent's written request to the employer.

Reasonable costs to the employer of said deductions shall be a proper subject of collective bargaining. Such right to deduction, unless revoked pursuant to s. 447.507, shall be in force for so long as the employee organization remains the certified bargaining agent for the employees in the unit. The public employer is expressly prohibited from any involvement in the collection of fines, penalties, or special assessments.

(2)(a) The Legislature acknowledges that Florida is a right to work state as guaranteed by s. 6, Art. I of the State Constitution, which provides employees the right to bargain collectively. However, the State Constitution does not require an employer to deduct and collect a bargaining agent's dues and uniform assessments from an employee's salary. Furthermore, the Legislature, in implementing s. 6, Art. I of the State Constitution, has declared that it is the public policy of this state to neither encourage nor discourage participation in a certified employee organization. The current statutory right of a collective bargaining agent to have its dues and uniform assessments deducted from an employee's salary is inconsistent with this policy because it assumes a non-neutral position regarding membership in a certified employee organization. By statutorily requiring an employer to deduct a collective bargaining agent's dues and assessments, the state facilitates the financial support of that organization not only for its collective bargaining functions but for whatever political or social causes that organization chooses to support. The payroll deduction process does not require the identification of how the money deducted will be used. Other voluntary payroll deductions

are clear on their face as to the amount and purpose of the deductions. In addition, other payroll deductions are not encumbered with the legal complexities surrounding collective bargaining rights and this state's policy of neutrality regarding membership in a certified employee organization. Moreover, the First Amendment to the United States Constitution guarantees a person freedom of association, which includes the right of a person to not be compelled to financially support a social cause or a political candidate or cause. To the extent members of a certified employee organization are uninformed regarding the use of their payroll deducted dues and assessments, are unaware of their rights to be refunded any portion of such dues or assessments used for political or social purposes to which they do not agree, or are prevented or inhibited from exercising their associational rights, directly or indirectly, for whatever reason and from whatever source, then the state's participation in their payroll deduction impinges on those employees' First Amendment rights.

1. The Legislature finds that instructional personnel represent the largest collective bargaining unit in this state. Furthermore, the Legislature recognizes and finds that teacher shortages in this state have reached critical proportions and anticipates that Florida will need an additional 162,000 teachers over the next 10 years to meet the challenges of this state's growing student population. Attracting new teachers as well as retaining existing teachers is a priority for this Legislature. Furthermore, the Legislature finds that this state has a substantial and compelling interest in protecting the

First Amendment rights of instructional personnel and that the state's ability to recruit and retain instructional personnel should be enhanced by empowering instructional personnel to pursue their First Amendment rights and to make informed decisions regarding their political and social participation within the context of exercising their collective bargaining rights. The Legislature also finds that, as a result of the recent merger and industry consolidation of the collective bargaining agents that represented instructional personnel as defined in s. 1012.01, a virtual monopoly in such services has been created in this state, depriving instructional personnel of the benefits of competition. Accordingly, this state must redouble its efforts to remain neutral and thereby not empower or detract from that collective bargaining agent's representational role, or from the employees' ability to be represented in the collective bargaining process by whomever they so choose.

2. Because of these facts and trends, the Legislature finds that the current status of instructional personnel constitutes a set of circumstances distinct and unique from any other area of public employment within this state. Therefore, the Legislature finds that with regard to instructional personnel, the deduction and collection of the certified bargaining agent's dues and uniform assessments should not be mandated by the Legislature but should be a permissive subject of collective bargaining, as otherwise restricted by this section. The Legislature further finds that the restrictions imposed by this section do not interfere with the ability of

instructional personnel to be a member of a certified labor organization or to contribute directly to that organization in support of its noncollective bargaining activities.

(b) With regard to a certified bargaining agent that represents instructional personnel as defined in s. 1012.01, any deduction and collection by an employer of that certified bargaining agent's dues and uniform assessments from an employee's salary may be a proper subject of collective bargaining. If the deduction and collection of an agent's dues and uniform assessments are collectively bargained, the collectively bargained agreement shall provide that payroll deduction for dues or uniform assessments shall not exceed an amount actually used for activities of the certified bargaining agent necessary to perform the agent's duties regarding the resolution of labor-management issues which consist of collective bargaining, contract administration, and grievance adjustment. Such amount shall not include any amounts used for any other purpose, including, but not limited to, electoral activities; independent expenditures or contributions to any candidate, political party, political committee, or committee of continuous existence; voter registration campaigns; or any other political or legislative cause, including, but not limited to, ballot initiatives. Additionally, the collectively bargained agreement must require the written authorization of the employee; commencement of the deductions upon the bargaining agent's written request to the employer; collection of reasonable costs, which must include all of the costs incurred by the employer for making such deduction; revocation

provisions, including revocation pursuant to s. 447.507; and a prohibition against the public employer's collecting fines, penalties, or special assessments or for any purpose other than labor-management issues, as provided for in this subsection.

(c) The collectively bargained agreement shall also provide for a reasonable accounting of payroll deductions through either:

1. The perpetual segregation of all funds received through payroll deductions from any funds used for purposes not authorized in paragraph (b); or

2. An independent audit of the use of funds received through payroll deductions.

(d) Any taxpayer or other aggrieved party may seek enforcement of this subsection in a court of competent jurisdiction. In addition to injunctive relief prohibiting violations of a bargaining agreement and this subsection, relief shall include an order for a pro rata refund to bargaining unit members in an amount equal to the amount of any funds received through payroll deduction which were used in violation of this subsection. Such refund shall be enforced by an order reducing payroll deductions up to 50 percent below the agreed amount each pay period until the amount has been fully refunded. A refund under this paragraph shall supplement and not preclude a money judgment against the bargaining unit in favor of one or more individuals who had funds deducted from their pay that were used in violation of this subsection.

Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1145 Official State Designations
SPONSOR(S): Evers and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1494

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Governmental Operations Committee	7 Y, 0 N	Brown	Williamson
2) State Administration Council		Brown	Bussey
3)			
4)			
5)			

SUMMARY ANALYSIS

The bill makes the phrase "In God We Trust" the official motto of the State of Florida.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

The bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

History

The Department of State's Office of Cultural and Historical Programs provides the following history of the Seal of the State of Florida:[1]

> The elements and basic design instructions for Florida's State Seal were established by the Legislature in 1868. Early that year, Florida's newly adopted State Constitution had directed that: "The Legislature shall, at the first session, adopt a seal for the state, and such seal shall be the size of an American silver dollar, but said seal shall not again be changed after its adoption by the Legislature."[2]
>
> So the Legislature, acting quickly upon the mandate, passed and sent to Governor Harrison Reed a Joint Resolution on August 6, 1868 specifying "That a Seal of the size of the American silver dollar, having in the center thereof a view of the sun's rays over a high land in the distance, a cocoa tree, a steamboat on water, and an Indian female scattering flowers in the foreground, encircled by the words, 'Great Seal of the State of Florida: In God We Trust', be and the same is hereby adopted as the Great Seal of the State of Florida." *Some people also consider the "In God We Trust" phrase the State Motto, although there is no official designation of a State Motto in the Florida Statutes.*
>
> Florida's present Constitution, (Art. II, Sec. 4), continues to require the seal to be prescribed by law.

(Emphasis added.) The effect of the proposed legislation is to correct this omission and statutorily determine that "In God We Trust" is the official motto of the State of Florida.

C. SECTION DIRECTORY:

Section 1 creates 15.0301, F.S., designating "In God We Trust" as the official motto of the State of Florida.

Section 2 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not create, modify, amend, or eliminate a state revenue source.

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[1] Available online at: http://dhr.dos.state.fl.us/facts/symbols/seals.cfm.

[2] Article XVI, Section 20, 1868 Constitution of the State of Florida. Available online here: http://www.floridamemory.com/Collections/Constitution/1868_index.cfm.

2. Expenditures:

The bill does not create, modify, amend, or eliminate a state expenditure.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

The bill does not create, modify, amend, or eliminate a local expenditure.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The bill raises a potential federal constitutional issue regarding the separation of church and state, protected in the First Amendment of the Constitution of the United States, which begins, "Congress shall make no law respecting an establishment of religion...."

"In God We Trust" is the official motto of the United States of America.[3] The federal motto has been challenged multiple times and has been found to be constitutional. In *Aronow v. United States*, 432 F.2d 242 (1970) the Ninth Circuit Court of Appeals ruled that:

> "It is quite obvious that the national motto and the slogan on coinage and currency 'In God We Trust' has nothing whatsoever to do with the establishment of religion. Its use is of patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise."

In *Madalyn Murray O'Hair, et al. v. W. Michael Blumenthal, Secretary of Treasury, et al.*, 588 F.2d 1144 (1979), the Fifth Circuit Court of Appeals sustained a prior decision by the United States District Court (Western District of Texas). The Western District of Texas had expanded on the *Aronow* citation above, saying:

> From this it is easy to deduce that the Court concluded that the primary purpose of the slogan was secular; it served a secular ceremonial purpose in the obviously secular function of providing a medium of exchange. As such it

[3] 36 U.S.C. s. 302 (2005).

> is equally clear that the use of the motto on the currency or otherwise does not have a primary effect of advancing religion.

The Supreme Court of the United States recently handed down another Establishment Clause decision, though not directly dealing with a state or federal motto. On June 14, 2004, the Supreme Court issued a decision upholding the phrase "One Nation under God" in the Pledge of Allegiance.[4] The Plaintiff, Newdow, was denied relief on issues of standing,[5] however, in her concurrence with the judgment, Justice O'Connor wrote that

> [G]overnment can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of "Ceremonial deism" most clearly encompasses such things as the national motto ("In God We Trust"), religious references in traditional patriotic songs such as the Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions ("God Save the United States and this honorable Court.")[6]

At least three other states also have official mottos that mention "God."[7]

- Arizona: *Ditat Deus.* (Latin: "God Enriches.")
- Ohio: "With God, All Things Are Possible."[8]
- South Dakota: "Under God, The People Rule."

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

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[4] *Elk Grove Unified School District v. Newdow*, 124 Sup.Ct. 2301 (2004).

[5] Summarizing very briefly: Mr. Newdow was a non-custodial parent challenging a school recitation of the Pledge of Allegiance on behalf of his child. Justice Stevens delivered the opinion of the Court, finding that, based on lower family-court rulings, Mr. Newdow did not have standing to challenge the school's recitation of the Pledge each morning. Several justices filed concurrences in the opinion. These Justices generally agreed with the ultimate outcome but believed that Mr. Newdow should be denied relief on substantive constitutional grounds instead of procedural grounds.

[6] Ironically, Justice O'Connor errs when mentioning Florida in the sole footnote of her concurrence. She states that Florida's official state motto is "In God We Trust," and that the state has placed its motto on its state seal. As mentioned above in the quotation from the Department of State's Office of Cultural and Historical Programs, the opposite will in fact be true, if this legislation is successful.

[7] A fourth, Colorado, comes close. The state motto of Colorado is *Nil sine numine,* Latin for " Nothing without Providence," but also is translated as "Nothing without a will." Wikipedia, the egalitarian online encyclopedia (which is open to editing by any reader, and thus sometimes challenged for veracity), contains an enlightening discussion about this Latin phrase and its potential religiosity. The article is available here: http://en.wikipedia.org/wiki/Nil_sine_numine.

[8] Taken from Matthew 19:25-26, the Holy Bible (King James Version). A detailed summary of Ohio litigation (ultimately upholding Ohio's right to mention God in its motto) is available here: http://www.religioustolerance.org/sta_mott.htm.

A bill to be entitled

An act relating to official state designations; creating s. 15.0301, F.S.; designating an official state motto; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 15.0301, Florida Statutes, is created to read:

15.0301 State motto.--"In God We Trust" is hereby designated and declared the official motto of the State of Florida.

Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7045 PCB GO 06-16 OGSR Supplemental Rebate Agreements
SPONSOR(S): Governmental Operations Committee, Rivera
TIED BILLS: None **IDEN./SIM. BILLS:** SB 516

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee	5 Y, 0 N	Williamson	Williamson
1) Health Care Regulation Committee	8 Y, 0 N	Bell	Mitchell
2) State Administration Council		Williamson	Bussey
3)			
4)			
5)			

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The bill reenacts the public records exemption relating to supplemental rebate agreements. It narrows the exemption by removing the public records exemption for trade secrets. It reenacts the public meetings exemption for the Medicaid Pharmaceutical and Therapeutics Committee. In addition, it requires that a record be made of each portion of an exempt meeting. The exemptions will repeal on October 2, 2006, if this bill does not become law.

This bill may have a fiscal impact on state government. It does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill narrows the public records exemption thereby increasing public access to government information. The bill requires the Medicaid Pharmaceutical and Therapeutics Committee to make a record of each portion of an exempt meeting.

B. EFFECT OF PROPOSED CHANGES:

Background

The 2001 Florida Legislature significantly expanded its efforts to control pharmaceutical costs in the state's Medicaid program by enacting a program called the preferred drug list (PDL).[1] Under this law, Medicaid prescribing practitioners are required to prescribe the medications on the PDL, or must obtain prior authorization from the Agency for Health Care Administration (AHCA) to prescribe a medication not on the PDL, in order for Medicaid to pay for the prescription.

In order for a drug manufacturer to have its medications considered for inclusion on the PDL, it must agree to provide the state both federally mandated rebates and state-mandated supplemental rebates. Since rebate negotiations involve disclosure by pharmaceutical manufacturers of proprietary information regarding the elements of their wholesale pricing, federal law prohibits disclosure of information received by Medicaid agencies from manufacturers that discloses identities of manufacturers or wholesalers or the prices charged by these manufacturers or wholesalers.[2] The federal prohibition applies to the U.S. Secretary of the Department of Health and Human Services, the U.S. Secretary of Veterans Affairs, or a state agency or contractor.

To address the federal confidentiality requirements and to ensure the use of this pricing information for negotiating state supplemental rebate agreements, the 2001 Legislature enacted a public records and public meetings exemption related to rebate negotiations.[3] Trade secrets, rebate amount, percent of rebate, manufacturer's pricing, and supplemental rebates with respect to supplemental rebate negotiations are confidential and exempt[4] from public records requirements.

According to Senate interim project report 2006-219, the state supplemental rebate negotiation process has been facilitated by this exemption and has been successful in benefiting the people of Florida. Since its implementation in 2002, the PDL program has generated over $262 million in state supplemental rebates, with $292 million in additional costs savings projected for Fiscal Year 2005-2006, a significant portion of which will be derived from supplemental rebate negotiations.

Current law also provides a public meetings exemption applicable in limited circumstances. Portions of meetings of the Medicaid Pharmaceutical and Therapeutics Committee are exempt from public meetings requirements if the aforementioned confidential and exempt records are discussed.[5]

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[1] Chapter 2001-104, L.O.F.
[2] 42 U.S.C. 1396r 8
[3] Chapter 2001 216, L.O.F.; codified in s. 409.91196, F.S.
[4] There is a difference between records that are exempt from public records requirements and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such record cannot be released by an agency to anyone other than to the persons or entities designated in the statute. *See* Attorney General Opinion 85-62. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances. *See Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[5] Section 409.91196(2), F.S.

Pursuant to the Open Government Sunset Review Act,[6] the exemption will repeal on October 2, 2006, unless reenacted by the Legislature.[7] House staff reviewed the public records and public meetings exemption pursuant to the Open Government Sunset Review Act and determined that, with modification, the exemption meets the requirements for reenactment.[8] Based on AHCA's survey response, it appeared that the public records exemption for trade secrets was unnecessary because AHCA stated that rebate agreements and supplemental rebate amounts were trade secrets for purposes of the exemption. Such information is protected under the current public records exemption.

Effect of Bill

The bill removes the repeal date, thereby reenacting the public records and public meetings exemptions. It narrows the public records exemption by removing the exemption for trade secrets.

The bill requires the Medicaid Pharmaceutical and Therapeutics Committee, which is created within AHCA,[9] to make a record of each portion of an exempt meeting. The record must include the time of commencement and termination, all discussions and proceedings, the names of all persons present at any time, and the names of all persons speaking. The record of the exempt portion of a meeting is a public record; however, the rebate amount, percent of rebate, manufacturer's pricing, and supplemental rebate included in the record is confidential and exempt from public disclosure because of the public records exemption already afforded AHCA.[10]

Finally, the bill makes editorial changes and removes superfluous language.

C. SECTION DIRECTORY:

Section 1 amends s. 409.91196, F.S., to remove the repeal date.

Section 2 provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

   The bill does not create, modify, amend, or eliminate local expenditures.

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[6] Section 119.15, F.S.
[7] Section 409.91196(3), F.S.
[8] Staff surveyed and interviewed AHCA staff.
[9] Section 409.91195, F.S.
[10] *See* s. 409.91196(1), F.S.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill requires the Medicaid Pharmaceutical and Therapeutics Committee, which is a part of AHCA, to maintain a record of exempt portions of meetings. This could create a negative fiscal impact; however, the committee already hires a court reporter to keep a record of the open portion of the meeting. As such, additional expenditures should be avoided.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Open Government Sunset Review Act

The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act regarding supplemental rebate agreements; amending s. 409.91196, F.S., which provides an exemption from public records requirements for the rebate amount, percent of rebate, manufacturer's pricing, and supplemental rebate held by the Agency for Health Care Administration relative to a preferred drug list established by the agency and an exemption from public meetings requirements for that portion of a meeting of the Medicaid Pharmaceutical and Therapeutics Committee at which such rebate amounts, percent of rebates, manufacturer's pricing, and supplemental rebates are discussed; making editorial changes; removing superfluous language; requiring that a record of an exempt portion of a meeting be made and maintained; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 409.91196, Florida Statutes, is amended to read:

409.91196 Supplemental rebate agreements; public ~~confidentiality of~~ records and public meetings exemption.--

(1) The ~~Trade secrets,~~ rebate amount, percent of rebate, manufacturer's pricing, and supplemental rebate held by ~~rebates which are contained in records of~~ the Agency for Health Care Administration under s. 409.912(39)(a)7. ~~and its agents with~~

~~respect to supplemental rebate negotiations and which are prepared pursuant to a supplemental rebate agreement under s. 409.912(40)(a)7.~~ are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(2) That portion of a meeting ~~Those portions of meetings~~ of the Medicaid Pharmaceutical and Therapeutics Committee at which the ~~trade secrets,~~ rebate amount, percent of rebate, manufacturer's pricing, and supplemental rebate ~~rebates~~ are discussed is ~~disclosed for discussion or negotiation of a supplemental rebate agreement under s. 409.912(40)(a)7. are~~ exempt from s. 286.011 and s. 24(b), Art. I of the State Constitution. A record shall be made of each exempt portion of a meeting. Such record must include the times of commencement and termination, all discussions and proceedings, the names of all persons present at any time, and the names of all persons speaking. No exempt portion of a meeting may be held off the record.

~~(3) Subsections (1) and (2) are subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7047 PCB GO 06-20 OGSR Tobacco Settlement Agreement
SPONSOR(S): Governmental Operations Committee, Rivera
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1530

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee	6 Y, 0 N	Williamson	Williamson
1) Judiciary Committee	12 Y, 0 N	Thomas	Hogge
2) State Administration Council		Williamson	Bussey
3)			
4)			
5)			

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The bill reenacts the public records exemption for proprietary confidential business information used to calculate the annual tobacco settlement payments. The exemption will repeal on October 2, 2006, if this bill does not become law.

The bill may have a minimal non-recurring positive fiscal impact on state government. The bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

In February 1995, the State of Florida filed suit against a number of tobacco manufacturers asserting various claims for monetary and injunctive relief.[1] On March 3, 1996, the State of Florida, as one of five settling states,[2] settled all of its claims against Liggett Group, Inc., Brooke Group, Ltd., and Liggett & Myers, Inc. In August 1997, the "Big Four" tobacco companies (Phillip Morris, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., and Lorillard Tobacco Company) entered into a $368.5 billion tobacco settlement agreement with Florida for all past, present, and future claims by the state, including reimbursement of Medicaid expenses, fraud, RICO,[3] and punitive damages. Current law defines these settlements to mean the settlement, as amended, in the case of *State v. American Tobacco Co. et al.*, No. 95-1466AH (Fla. 15th Cir. Ct. 1996).[4]

The settling tobacco companies must make settlement payments to Florida in perpetuity.[5] The annual tobacco settlement payments are based on several factors that include the total volume of U.S. cigarette sales, each company's share of the national market, net operating profits, and consumer price indices. Statutory guidelines were established to govern the expenditure of the tobacco settlement proceeds.[6]

In 2000, the Legislature established the Task Force on Tobacco-Settlement Revenue Protection to determine the need for, and to evaluate methods for, protecting the state's settlement revenue from significant loss.[7] The task force recommended that the Legislature provide a process for verifying that the tobacco settlement payments received are in accordance with the Florida Settlement Agreement. The report further recommended that the Legislature provide a public records exemption for information considered necessary to verify the accuracy of the payments made by the tobacco companies if such information is a trade secret or insider information.[8]

As a result, the Legislature enacted a public records exemption for information used to calculate the annual tobacco-settlement payments.[9] Proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for

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[1] The lawsuit included as defendants the American Tobacco Company, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Company, Philip Morris, Inc., Liggett Group, Inc. Brooke Group, Ltd., Lorillard Company, British American Tobacco Co., Ltd., and Dosal Tobacco Corp, Inc.

[2] The five states that entered into the settlement agreement are West Virginia, Florida, Mississippi, Massachusetts, and Louisiana.

[3] "Florida Racketeer Influenced and Corrupt Organization Act" in ss. 895.01-895.06, F.S.

[4] *See* ss. 215.56005(1)(f) and 569.215, F.S.

[5] From the date of the settlement, Florida was to receive $11.3 billion over the next 25 years and an additional $1.7 billion over the next five years because of a most favored nation clause in the settlement agreement, as amended. Florida negotiated a "Most Favored Nations" clause in the settlement, which provides the state with additional monies for a period, after Minnesota settled with the defendants on terms more favorable than Florida's.

[6] *See* s. 569.21, F.S.

[7] *See* ch. 2000-128, L.O.F.

[8] Senate Staff Analysis and Economic Impact Statement for SPB 7066, prepared by the Regulated Industries Committee, January 17, 2006, at 4.

[9] Chapter 2001-136, L.O.F.; codified in s. 569.215, F.S.

settlement payments pursuant to the tobacco settlement agreement is confidential and exempt[10] from public records requirements. Furthermore, such information received by the Chief Financial Officer or the Auditor General for verifying annual settlement payments, is confidential and exempt.

Proprietary confidential business information means information that:

- Is owned or controlled by a tobacco company that is a signatory to the settlement agreement;
- Is intended to be and is treated by a tobacco company as private in that the disclosure of the information would cause harm to the company's business operations; and
- Has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public.[11]

Such information includes:

- Trade secrets.
- Information in a Form 10-K that is confidential pursuant to an order of the Division of Corporation Finance of the Securities and Exchange Commission.
- Internal auditing control policies and procedures and reports of internal auditors.
- Financial operating and marketing information that, if disclosed, could impair the competitive business interests of the provider.
- Financial statements.[12]
- Report letters from independent auditors relating to domestic operating company income.
- Analyses of specific items of revenue and expense included in operating profit and extraordinary items.[13]
- Working papers,[14] schedules,[15] analyses, and reconciliations[16] prepared by company personnel for the purpose of clarifying the disclosures of domestic tobacco revenues and operating profit contained in financial statements or other information related to the sale or production of tobacco products.

Pursuant to the Open Government Sunset Review Act,[17] the exemption will repeal on October 2, 2006, unless reenacted by the Legislature.

Effect of Bill

The bill removes the repeal date, thereby reenacting the public records exemption. It clarifies that the exemption applies to trade secrets as defined in s. 688.002, F.S., of the Uniform Trade Secrets Act.[18] The current exemption does not provide a definition for trade secrets. Finally, the bill makes editorial changes.

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[10] There is a difference between records that are exempt from public records requirements and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such record cannot be released by an agency to anyone other than to the persons or entities designated in the statute. *See* Attorney General Opinion 85-62. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances. *See Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

[11] Section 569.215(2), F.S.

[12] Financial statements consist of balance sheets, statements of income and cash flows, and notes related thereto, of any subsidiary that is part of a consolidated group and engaged in the production or sale of tobacco products. Section 569.215(2)(e), F.S.

[13] Extraordinary items consist of one-time tobacco litigation settlement costs and restructuring charges. Section 569.215(2)(g), F.S.

[14] According to tobacco company and agency responses to staff questionnaires, working papers are evidentiary materials used by accountants and auditors to document particular entries as debits/credits or income/expense. These documents include invoices, purchase orders, policies, and memoranda.

[15] According to tobacco company and agency responses to staff questionnaires, a schedule is an attachment to working papers, analysis, and reconciliations. A schedule also has been described as a list of accounting entries, such as expense items.

[16] According to tobacco company and agency responses to staff questionnaires, reconciliation is a comparison between two accounting documents, sets of information, or conclusions that were derived using different procedures.

[17] Section 119.15, F.S.

[18] Chapter 688, F.S.

C. SECTION DIRECTORY:

Section 1 amends s. 569.215, F.S., to remove the October 2, 2006, repeal date.

Section 2 provides an October 1, 2006, effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

The bill may represent a minimal non-recurring positive impact on state expenditures. A bill enacting or amending a public records exemption causes a non-recurring negative fiscal impact in the year of enactment because of training employees responsible for replying to public records requests. In the case of bills reviewed under the Open Government Sunset Review process, training costs are incurred if the bill does not pass or if the exemption is amended, as retraining is required. Because the bill eliminates the repeal of the exemption, state government may recognize a minimal nonrecurring decrease in expenditures because employee-training activities are avoided.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

This bill does not create, modify, amend, or eliminate a local expenditure.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Open Government Sunset Review Act

The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act regarding the tobacco settlement agreement; amending s. 569.215, F.S., which provides an exemption from public records requirements for proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the settlement agreement in the case of State of Florida et al. v. American Tobacco Company et al., or received by the Chief Financial Officer or the Auditor General for any purpose relating to verifying settlement payments made pursuant to the settlement agreement; clarifying the definition of "trade secrets" for purposes of the exemption; making editorial changes; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 569.215, Florida Statutes, is amended to read:

569.215 Confidential records relating to tobacco settlement agreement.--

(1) Proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the settlement agreement, as amended, in

the case of State of Florida et al. v. American Tobacco Company et al., No. 95-1466AH, in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, or received by the Chief Financial Officer or the Auditor General for any purpose relating to verifying settlement payments made pursuant to the settlement agreement is confidential and exempt from ~~the provisions of~~ s. 119.07(1) and s. 24(a) of Art. I of the State Constitution. Any state or federal agency that is authorized to have access to such documents by any provision of law shall be granted such access in furtherance of such agency's statutory duties, notwithstanding the provisions of this section. Proprietary confidential business information received under this section shall not retain its confidential and exempt status if that information is made public, including publicizing such information in a Securities and Exchange Commission filing, an annual financial statement, or other document or means. ~~This exemption is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.~~

(2) As used in this section, the term "proprietary confidential business information" means information, regardless of form or characteristics, which is owned or controlled by a tobacco company that is a signatory to the settlement agreement, as amended, in the case of State of Florida et al. v. American Tobacco Company et al., No. 95-1466AH, in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, is intended to be and is treated by a tobacco company as private in

that the disclosure of the information would cause harm to the company's business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public. The term includes, but is not limited to:

(a) Trade secrets as defined in s. 688.002.

(b) Information in a Form 10-K that is confidential pursuant to an order of the Division of Corporation Finance of the Securities and Exchange Commission.

(c) Internal auditing control policies and procedures and reports of internal auditors.

(d) Financial operating and marketing information prepared in the ordinary course of business, the disclosure of which could impair the competitive business of the provider of information.

(e) Financial statements, which consist of balance sheets, statements of income and cash flows, and notes related thereto, of any subsidiary that is part of a consolidated group and engaged in the production or sale of tobacco products.

(f) Report letters from independent auditors relating to domestic operating company income.

(g) Analyses of specific items of revenue and expense included in operating profit and extraordinary items. As used in this paragraph, the term "extraordinary items" consists of one-time tobacco litigation settlement costs and restructuring charges.

(h) Working papers, schedules, analyses, and reconciliations prepared by company personnel for the purpose of clarifying the disclosures of domestic tobacco revenues and operating profit contained in financial statements or other information related to the sale or production of tobacco products.

Section 2. This act shall take effect October 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7049 PCB GO 06-21 OGSR Florida Surplus Lines Service Office
SPONSOR(S): Governmental Operations Committee, Rivera
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1586

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee	6 Y, 0 N	Williamson	Williamson
1) Insurance Committee	14 Y, 0 N	Callaway	Cooper
2) State Administration Council		Williamson	Bussey
3)			
4)			
5)			

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The bill reenacts the public records exemption for information furnished to the Florida Surplus Lines Service Office under the Surplus Lines Law if disclosure would reveal information specific to a particular policy or policyholder. The exemption will repeal on October 2, 2006, if this bill does not become law.

The bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

An insurance company that transacts insurance in Florida or that has an office located in the state is required to obtain a certificate of authority (COA) issued by the Office of Insurance Regulation.[1] Surplus lines insurers are an exception to the COA requirement.

Surplus lines insurance is coverage provided by a company that is not licensed in Florida but is allowed to transact insurance in the state as an eligible insurer. The purpose of the Surplus Lines Law[2] is to provide the public with access to insurers not authorized to transact business in Florida when certain insurance coverage cannot be obtained from Florida-authorized insurers.[3] Insurance can be purchased from a surplus lines carrier only if the necessary amount of coverage cannot be procured after a diligent effort[4] to buy the coverage from authorized insurers.

In 1997, the Legislature created the Florida Surplus Lines Service Office (office), a non-profit association designed to act as a self-regulating organization to permit better access by consumers to approved surplus lines insurers.[5] A nine-person board of governors governs the office.[6] The office must perform its functions under a plan of operation that is subject to approval by the Office of Insurance Regulation.[7] The office must:[8]

- Receive, record, and review all surplus lines insurance policies;[9]
- Maintain a record of the policies reported to the office and prepare monthly reports;[10]
- Prepare and deliver to each surplus lines agent quarterly reports of each agent's business;[11]
- Collect and remit to the Department of Financial Services (DFS) the surplus lines tax;[12]
- Reconcile policies provided by non-admitted insurers with the policies reported to the office by agents;[13] and
- Collect monthly from each surplus lines agent a service fee of .25 percent.[14]

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[1] Section 624.401, F.S.
[2] Sections 626.913 – 626.937, F.S.
[3] Section 626.913(2), F.S.
[4] A "diligent effort" means seeking coverage from and being rejected by at least three authorized insurers that write the type of coverage sought. The rejections must be documented. *See* s. 626.914(4), F.S.
[5] Chapter 97-196, L.O.F.; codified as s. 626.921, F.S.
[6] Section 626.921(4), F.S.
[7] Section 626.921(5), F.S.
[8] *See generally* subsections (3) and (6) of s. 626.921, F.S.
[9] Section 626.921(3)(a), F.S.
[10] Section 626.921(3)(b), F.S. Currently, the office must prepare a "Quasar" report that includes new business reported by agents, policy cancellations, and policy renewals. Senate Staff Analysis and Economic Impact Statement for SPB 7070 by the Banking and Insurance Committee, January 23, 2006, at 4.
[11] Section 626.921(3)(c), F.S.
[12] Section 626.932(2), F.S.
[13] Section 626.921(3)(d), F.S.
[14] The office may collect up to .3 percent of total gross premium. The fee pays for the cost of operating the office. It is paid by the insurer. *See* s. 626.921(3)(f), F.S.

Surplus lines agents (agents) handle the placement of insurance coverage with surplus lines insurers and place coverage with authorized insurers with whom the agent is not licensed.[15] In order to place a business with a surplus lines carrier, the agent must make a diligent effort to place the policy with a Florida-authorized insurer.[16] Agents are required to report and file with the office a copy of, or information on, each surplus lines insurance policy.[17] Upon request by DFS or the office, agents must submit:

- An exact copy of any and all requested policies and other forms confirming insurance coverage[18] along with any substitutions or endorsements;[19] and
- The agent's memorandum as to the substance of any change represented by a substitute certificate, cover note, other form of confirmation of insurance coverage, or endorsement as compared with the coverage as originally placed or issued.[20]

Current law provides a public records exemption for information furnished to DFS[21] or the office,[22] under the Surplus Lines Law, if disclosure would reveal information specific to a particular policy or policyholder. The public records exemption no longer applies if DFS or the office institutes a proceeding against an agent or insurer. Pursuant to the Open Government Sunset Review Act,[23] the exemption afforded the office will repeal on October 2, 2006, unless reenacted by the Legislature.[24]

Effect of Bill

The bill removes the repeal date, thereby reenacting the public records exemption. It also makes editorial changes.

C. SECTION DIRECTORY:

Section 1 amends s. 626.921, F.S., to remove the October 2, 2006, repeal date.

Section 2 provides an October 1, 2006, effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   This bill does not create, modify, amend, or eliminate a state expenditure.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

[15] Section 626.914(1), F.S.
[16] Section 626.914(4), F.S.
[17] Agents must submit specific information on each policy including the name of the insured and insurer, the policy number and its effective date, the policy's expiration date, the zip code and county where the covered risk is located, the type of coverage, the premium, effective date, and service fees. Section 626.921(2), F.S.
[18] Such as applications, certificates, and cover notes.
[19] Section 626.923, F.S.
[20] *Id.*
[21] Section 626.921(8)(a), F.S.
[22] Section 626.921(8)(b), F.S.
[23] Section 119.15, F.S.
[24] Section 626.921(8)(b), F.S.

1. Revenues:

   This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

   This bill does not create, modify, amend, or eliminate a local expenditure.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may represent a minimal non-recurring positive impact on the Florida Surplus Lines Service Office expenditures. A bill enacting or amending a public records exemption causes a non-recurring negative fiscal impact in the year of enactment because of training employees responsible for replying to public records requests. In the case of bills reviewed under the Open Government Sunset Review process, training costs are incurred if the bill does not pass or if the exemption is amended, as retraining is required. Because the bill eliminates the repeal of the exemption, the office may recognize a minimal nonrecurring decrease in expenditures because employee-training activities are avoided.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Open Government Sunset Review Act

The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,

- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act regarding the Florida Surplus Lines Service Office; amending s. 626.921, F.S., which provides an exemption from public records requirements for information furnished to the Department of Financial Services by surplus lines agents, information contained in records of surplus lines agents subject to examination by the department, and information furnished to the Florida Surplus Lines Service Office under the Surplus Lines Law; making editorial changes; removing superfluous language; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (8) of section 626.921, Florida Statutes, is amended to read:

626.921 Florida Surplus Lines Service Office.--

(8)(a) Information furnished to the department under s. 626.923 or contained in ~~the~~ records subject to examination by the department under s. 626.930 is confidential and exempt from ~~the provisions of~~ s. 119.07(1) and s. 24(a), Art. I of the State Constitution if ~~the~~ disclosure ~~of the information~~ would reveal information specific to a particular policy or policyholder. The exemption does not apply to any proceeding instituted by the department or office against an agent or insurer.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

(b) Information furnished to the Florida Surplus Lines Service Office under the Surplus Lines Law is confidential and exempt from ~~the provisions of~~ s. 119.07(1) and s. 24(a), Art. I of the State Constitution if ~~the~~ disclosure ~~of the information~~ would reveal information specific to a particular policy or policyholder. ~~This exemption does not prevent the disclosure of any information by~~ The Florida Surplus Lines Service Office may provide such information to the department in the furtherance of its duties and responsibilities~~, but the exemption applies to records obtained by the department from the Florida Surplus Lines Service Office~~. The exemption does not apply to any proceeding instituted by the department or office against an agent or insurer. ~~This paragraph is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7061 PCB GO 06-19 OGSR Database for Deferred Presentment Providers
SPONSOR(S): Governmental Operations Committee, Rivera
TIED BILLS: **IDEN./SIM. BILLS:** SB 1584

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee	6 Y, 0 N	Williamson	Williamson
1) Economic Development, Trade & Banking Committee	12 Y, 0 N	Olmedillo	Carlson
2) State Administration Council		Williamson	Bussey
3)			
4)			
5)			

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The bill reenacts the public records exemption for personal identifying information contained in the database for deferred presentment providers. The exemption will repeal on October 2, 2006, if this bill does not become law.

The bill may have a minimal non-recurring positive fiscal impact on state government. The bill does not appear to have a fiscal impact on local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

The Deferred Presentment Act,[1] which was enacted in 2001, provides requirements that apply to check cashing operations. Any person engaged in a deferred presentment transaction (deferred presentment provider[2]) must register with the Office of Financial Regulation (OFR) and is subject to its regulation.[3]

The maximum face amount of a check taken for deferred presentment cannot exceed $500, excluding allowable fees.[4] The maximum fee is 10 percent of the face amount, plus a maximum $5.00 verification fee.[5] Upon receipt of the customer's (drawer[6]) check, the deferred presentment provider must immediately provide the drawer with the amount of the check, minus the allowable fees. The deferred presentment agreement may not be for a term in excess of 31 days or less than seven days.[7] The provider cannot renew or extend any transaction (rollover) or hold more than one outstanding check for any one drawer at any one time.[8]

A deferred presentment provider cannot enter into a transaction with a person who has an outstanding transaction with any other provider, or with a person whose previous transaction with any provider was terminated for less than 24 hours.[9] To verify such information, the provider must access a database established by OFR[10] and must submit the following data on each transaction:

- Drawer's name, address, and drivers' license number;
- Drawer's social security or employment authorization alien registration number;
- Drawer's date of birth;
- Amount and date of the transaction;
- Date the transaction is closed; and
- Check number.[11]

Current law provides a public records exemption for identifying information contained in the database. A deferred presentment provider may access such information in order to verify whether any

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[1] Part IV of chapter 560, F.S.

[2] Deferred presentment providers are more commonly known as "pay-day lenders." Deferred presentment providers are businesses that charge a fee for cashing a customer's check and agreeing to hold that check for a certain number of days prior to depositing or redeeming the check. Section 560.402(6), F.S.

[3] Section 560.403, F.S.

[4] Section 560.404(5), F.S.

[5] Section 560.404(6), F.S. The maximum $5.00 verification fee is established by Rule 69V-560.801, Fla. Admin. Code, as authorized by s. 560.309(4), F.S.

[6] A drawer is a person who writes a personal check and upon whose account the check is drawn. Section 560.402(7), F.S.

[7] Section 560.404(8), F.S.

[8] Section 560.404(18), F.S.

[9] Section 560.404(19), F.S.

[10] OFR is required to establish this database of all deferred presentment transactions in the state and give providers real-time access through an Internet connection. OFR contracts with a private vendor, Veritec Solutions, Inc., to maintain the database. Senate Staff Analysis and Economic Impact Statement for S 7072, prepared by Banking and Insurance Committee, January 26, 2006, at 4.

[11] Section 560.404(23), F.S. All of the information is required by statute, except the drawer's date of birth and check number. Telephone conversation with staff of OFR, January 27, 2006.

transactions are outstanding for a particular person. Pursuant to the Open Government Sunset Review Act,[12] the exemption will repeal on October 2, 2006, unless reenacted by the Legislature.[13]

Effect of Bill

The bill removes the repeal date, thereby reenacting the public records exemption. It clarifies that the public records exemption applies to information that identifies a drawer or a deferred presentment provider. The bill also makes editorial changes.

C. SECTION DIRECTORY:

Section 1 amends s. 560.4041, F.S., to remove the October 2, 2006, repeal date.

Section 2 provides an October 1, 2006, effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   The bill may represent a minimal non-recurring positive impact on state expenditures. A bill enacting or amending a public records exemption causes a non-recurring negative fiscal impact in the year of enactment because of training employees responsible for replying to public records requests. In the case of bills reviewed under the Open Government Sunset Review process, training costs are incurred if the bill does not pass or if the exemption is amended, as retraining is required. Because the bill eliminates the repeal of the exemption, state government may recognize a minimal nonrecurring decrease in expenditures because employee-training activities are avoided.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

   This bill does not create, modify, amend, or eliminate local expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

[12] Section 119.15, F.S.
[13] Section 560.4041, F.S.

1. Applicability of Municipality/County Mandates Provision:

   This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

   None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

   Open Government Sunset Review Act

   The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

   The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

   - Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
   - Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
   - Protecting trade or business secrets.

   If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act regarding deferred presentment providers; amending s. 560.4041, F.S., which provides an exemption from public records requirements for information that identifies a drawer or a deferred presentment provider contained in the database for deferred presentment providers maintained by the Office of Financial Regulation of the Financial Services Commission; making clarifying and editorial changes; removing superfluous language; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 560.4041, Florida Statutes, is amended to read:

560.4041 Database for deferred presentment providers; public records exemption.--~~The identifying~~ Information that identifies a drawer or a deferred presentment provider contained in the database ~~for deferred presentment providers, which is~~ authorized under s. 560.404~~,~~ is confidential and exempt from s. 119.07(1)~~,~~ and s. 24(a), Art. I of the State Constitution. A deferred presentment provider may access information that it has entered into the database and may obtain an eligibility determination for a particular drawer based on information in the database. ~~, except that the identifying information in the database may be accessed by deferred presentment providers to~~

~~verify whether any deferred presentment transactions are outstanding for a particular person and by the office for the purpose of maintaining the database. This section is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, and shall stand repealed October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2006.

HB 7063

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7063 PCB GO 06-24 OGSR Alzheimer's Center and Research Institute
SPONSOR(S): Governmental Operations Committee, Rivera
TIED BILLS: **IDEN./SIM. BILLS:** SB 2066

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee	6 Y, 0 N	Williamson	Williamson
1) Health Care General Committee	7 Y, 0 N	Ciccone	Brown-Barrios
2) State Administration Council		Williamson	Bussey
3)			
4)			
5)			

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The bill reenacts the public records exemption for the Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute. The exemption will repeal on October 2, 2006, if this bill does not become law.

The bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

Florida law establishes the Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute (Alzheimer's Center) at the University of South Florida. The law requires the organization of a Florida not-for-profit corporation (corporation) for the sole purpose of governing and operating the Alzheimer's Center. Records of the corporation and its subsidiaries are public records.[1]

Current law provides a public records exemption for the Alzheimer's Center.[2] The following information is confidential and exempt[3] from public records requirements:

- Personal identifying information relating to program clients;
- Patient medical or health records;
- Materials that relate to methods of manufacture or production, potential trade secrets, potentially patentable material, actual trade secrets, or proprietary information received, generated, ascertained, or discovered during the course of research;
- Business transactions resulting from research;
- The identity of donors or prospective donors to the Alzheimer's Center who wishes to remain anonymous;
- Information received which is otherwise confidential and exempt; and
- Information received from a person from another state or nation or the Federal Government, which is confidential or exempt pursuant to those laws.

The Alzheimer's Center must provide such information to a governmental entity in the furtherance of that entity's duties and responsibilities. The governmental entity must maintain the confidential and exempt status of the information.

Pursuant to the Open Government Sunset Review Act,[4] the exemption will repeal on October 2, 2006, unless reenacted by the Legislature.

Effect of Bill

The bill removes the repeal date, thereby reenacting the public records exemption. It also makes editorial changes and removes superfluous language.

The bill removes the exemption for information received by the institute, which is otherwise confidential and exempt because it is unnecessary. In addition, it removes the clause reiterating the general

[1] Section 1004.445, F.S.
[2] Section 1004.445(9), F.S.
[3] There is a difference between records that are exempt from public records requirements and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such record cannot be released by an agency to anyone other than to the persons or entities designated in the statute. *See* Attorney General Opinion 85-62. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances. *See Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[4] Section 119.15, F.S.

requirement that a governmental entity granted access to confidential and exempt information must maintain the status of that information. In *Ragsdale v. State*,[5] the Florida Supreme Court held that

> [T]he applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record . . . the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands.[6]

In *City of Riviera Beach v. Barfield*,[7] the court stated "[h]ad the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute."[8] As such, the provision is unnecessary and has been removed, because had the Legislature intended for the confidential and exempt status to evaporate then the Legislature would have stated as much.

C. SECTION DIRECTORY:

Section 1 amends s. 1004.445(9), F.S., to remove the October 2, 2006, repeal date.

Section 2 provides an October 1, 2006, effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   The bill may represent a minimal non-recurring positive impact on state expenditures. A bill enacting or amending a public records exemption causes a non-recurring negative fiscal impact in the year of enactment because of training employees responsible for replying to public records requests. In the case of bills reviewed under the Open Government Sunset Review process, training costs are incurred if the bill does not pass or if the exemption is amended, as retraining is required. Because the bill eliminates the repeal of the exemption, the state may recognize a minimal nonrecurring decrease in expenditures because employee-training activities are avoided.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

   This bill does not create, modify, amend, or eliminate a local expenditure.

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[5] 720 So.2d 203 (Fla. 1998).
[6] *Id.* at 206, 207.
[7] 642 So. 2d 1135 (Fla. 4th DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995). In *Barfield*, Barfield argued that once the City of West Palm Beach shared its active criminal investigative information with the City of Riviera Beach the public records exemption for such information was waived. Barfield based that argument on a statement from the 1993 *Government-In-The-Sunshine Manual* (a booklet prepared by the Office of the Attorney General). The Attorney General opined "once a record is transferred from one public agency to another, the record loses its exempt status." The court declined to accept the Attorney General's view. As a result, that statement has been removed from the *Government-In-The-Sunshine Manual.*
[8] *Id.* at 1137.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Open Government Sunset Review Act

The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act regarding the Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute; amending s. 1004.445, F.S., which provides an exemption from public records requirements for personal identifying information relating to clients of programs created or funded through the Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute and held by the institute, the University of South Florida, or the State Board of Education, medical or health records relating to patients held by the institute, materials that relate to methods of manufacture or production, potential trade secrets, potentially patentable material, actual trade secrets, or proprietary information received, generated, ascertained, or discovered during the course of research conducted by or through the institute and business transactions resulting from such research, personal identifying information of a donor or prospective donor to the institute who wishes to remain anonymous, and any information received by the institute from a person from another state or nation or the Federal Government that is otherwise confidential or exempt pursuant to the laws of that state or nation or pursuant to federal law; narrowing the exemption; making editorial changes; removing superfluous language; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (9) of section 1004.445, Florida Statutes, is amended to read:

1004.445 Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute.--

(9) The following information is confidential and exempt from ~~the provisions of~~ s. 119.07(1) and s. 24, Art. I of the State Constitution:

(a) Personal identifying information relating to clients of programs created or funded through the Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute that ~~which~~ is held by the institute, the University of South Florida, or the State Board of Education ~~or by persons who provide services to clients of programs created or funded through contracts with the Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute~~;

(b) ~~Any~~ Medical or health records relating to patients held ~~which may be created or received~~ by the institute;

(c) Materials that relate to methods of manufacture or production, potential trade secrets, potentially patentable material, actual trade secrets as defined in s. 688.002, or proprietary information received, generated, ascertained, or discovered during the course of research conducted by or through the institute and business transactions resulting from such research;

(d) The personal identifying information ~~identity~~ of a donor or prospective donor to the ~~Johnnie B. Byrd, Sr., Alzheimer's Center and Research~~ institute who wishes to remain

anonymous~~, and all information identifying such donor or prospective donor~~; and

(e) ~~Any information received by the institute in the performance of its duties and responsibilities which is otherwise confidential and exempt by law; and~~

~~(f)~~ Any information received by the institute from a person from another state or nation or the Federal Government that ~~which~~ is otherwise confidential or exempt pursuant to the laws of that state ~~state's~~ or nation ~~nation's laws~~ or pursuant to federal law.

Any governmental entity that demonstrates a need to access such confidential and exempt information in order to perform its duties and responsibilities shall have access to such information ~~and shall otherwise keep such information confidential and exempt. This section is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15 and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature~~.

Section 2. This act shall take effect October 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7115 PCB GO 06-15 OGSR Autopsy Photographs and Recordings
SPONSOR(S): Governmental Operations Committee, Rivera
TIED BILLS: **IDEN./SIM. BILLS:** SB 592, SB 1052

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee	6 Y, 0 N	Williamson	Williamson
1) State Administration Council		Williamson	Bussey
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The bill reenacts the public records exemption for photographs and video and audio recordings of an autopsy in the custody of a medical examiner. The bill reorganizes the section and makes editorial changes. The exemption will repeal on October 2, 2006, if this bill does not become law.

The bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

District Medical Examiners
The Governor appoints a district medical examiner for each medical examiner district from nominees who are practicing physicians in pathology. The Medical Examiners Commission[1] submits the nominations to the Governor.[2]

Each district medical examiner may appoint as many physicians as necessary to serve as associate medical examiners. The associate medical examiner serves at the pleasure of the district medical examiner and, when necessary, provides "service at all times and all places within the district."[3]

The district medical examiner has the authority to perform or have performed whatever autopsies[4] or laboratory examinations he or she deems necessary and in the public interest.[5] In the absence of the medical examiner or the associate medical examiner, the state attorney of the county may appoint a competent physician to act in his or her stead.[6]

District Medical Examiner Records
The district medical examiner must maintain duplicate copies of records and the detailed findings of autopsy and laboratory investigations.[7]

Public Records Exemption
A photograph or video or audio recording of an autopsy in the custody of a medical examiner[8] is confidential and exempt[9] from public records requirements.[10] A surviving spouse may view and copy a photograph or video recording or listen to or copy the audio recording of the deceased spouse's

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[1] The Medical Examiners Commission is created within the Department of Law Enforcement (s. 406.02(1), F.S.) The commission establishes medical examiner districts within the state (s. 406.05, F.S.)
[2] Section 406.06(1)(a), F.S.
[3] Section 406.06(2), F.S.
[4] A medical examiner is required to perform an autopsy when any person dies of criminal violence; by accident; by suicide; suddenly, when in apparent good health; unattended by a practicing physician or other recognized practitioner; in any prison or penal institution; in police custody; in any suspicious or unusual circumstance; by criminal abortion; by poison; by disease constituting a threat to public health; or by disease, injury, or toxic agent resulting from employment. Section 406.11(11)(a), F.S.
[5] Section 406.11(2)(a), F.S.
[6] Section 406.15, F.S.
[7] Section 406.13, F.S.
[8] For purposes of the exemption, the term "medical examiner" means any district medical examiner, associate medical examiner, or substitute medical examiner acting pursuant to chapter 406, F.S. The term also includes any employee, deputy, or agent of a medical examiner or any other person who may obtain possession of a photograph or audio or video recording of an autopsy in the course of assisting a medical examiner in the performance of his or her official duties. Section 406.135(1), F.S.
[9] There is a difference between records that are exempt from public records requirements and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such record cannot be released by an agency to anyone other than to the persons or entities designated in the statute. *See* Attorney General Opinion 85-62. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances. *See Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[10] Section 406.135(1), F.S.

autopsy. If there is no surviving spouse, then the surviving parents have access to such records. If there is no surviving spouse or parent, then an adult child has access to such records. The surviving relative with whom authority rests to obtain confidential and exempt autopsy records may designate in writing an agent to obtain those records.[11]

Pursuant to a written request and in the furtherance of its duties and responsibilities, a local governmental entity or a state or federal agency may view or copy a photograph or video recording or may listen to or copy an audio recording of an autopsy. The identity of the deceased must remain confidential and exempt.[12]

The custodian of such records may not permit any other person to view or copy an autopsy photograph or video recording or to listen to or copy the audio recording without a court order.[13] A person must file a petition and obtain a court order in order to view, listen to, or copy such records. A surviving spouse must receive reasonable notice of the petition and of the opportunity to be present and heard at any hearing on the matter. If there is no surviving spouse, then such notice must be provided to the deceased's parents, and if the deceased has no living parent, then to the adult child of the deceased.[14] Upon a showing of good cause,[15] the court may issue an order authorizing a person to view or copy a photograph or video recording of an autopsy or to listen to or copy the audio recording.[16]

This public records exemption does not apply to such photographs or video or audio recordings submitted as part of a criminal or administrative proceeding; however, it appears to apply to such information submitted as part of a civil proceeding.[17] In *Sarasota Herald-Tribune v. State*,[18] the Second District Court of Appeal found that the public records exemption for autopsy photographs and video and audio recordings does not apply to a criminal proceeding because the statute specifically exempts criminal court proceedings from its application.

It is a third degree felony for any:

- Custodian of such photograph or video or audio recording who willfully and knowingly violates the provisions of the exemption.[19]
- Person who willfully and knowingly violates a court order issued pursuant to s. 406.135, F.S.[20]

Pursuant to the Open Government Sunset Review Act,[21] the exemption will repeal on October 2, 2006, unless reenacted by the Legislature.

Effect of Bill

The bill removes the repeal date, thereby reenacting the public records exemption. It also reorganizes the section and makes editorial changes.

C. SECTION DIRECTORY:

Section 1 amends s. 406.135, F.S., to remove the October 2, 2006, repeal date.

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[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Section 406.135(2)(b), F.S.
[15] In determining good cause, the court must consider whether disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records. In all cases, the viewing, copying, or listening must be under the direct supervision of the records custodian. Section 406.135(2)(a), F.S.
[16] Section 406.135(2)(a), F.S.
[17] Section 406.135(3)(c), F.S.
[18] 2005 WL 3112545 (Fla. App. 2 Dist.)
[19] Section 406.135(3)(a), F.S.
[20] Section 406.135(3)(b), F.S.
[21] Section 119.15, F.S.

Section 2 provides an October 1, 2006, effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   This bill does not create, modify, amend, or eliminate a state expenditure.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

   The bill may represent a minimal non-recurring positive impact on local government expenditures. A bill enacting or amending a public records exemption causes a non-recurring negative fiscal impact in the year of enactment because of training employees responsible for replying to public records requests. In the case of bills reviewed under the Open Government Sunset Review process, training costs are incurred if the bill does not pass or if the exemption is amended, as retraining is required. Because the bill eliminates the repeal of the exemption, local governments may recognize a minimal nonrecurring decrease in expenditures because employee-training activities are avoided.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

   Article I, s. 24(c) of the State Constitution, requires that an exemption be no broader than necessary to accomplish its stated purpose.

   In *Campus Communications, Inc., v. Earnhardt*,[22] the Fifth District Court of Appeal upheld the public records exemption for autopsy photographs and video and audio recordings against an

[22] 821 So.2d 388 (Fla. 5th DCA 2002), *review denied*, 848 So.2d 1153 (Fla. 2003).

unconstitutional over breadth challenge. The court found that the exemption met the constitutional requirement that the exemption be no broader than necessary to meet its public purpose. The court also found that the legislature stated with specificity the public necessity justifying the exemption.

The Fifth District Court of Appeal certified the question of constitutionality to the Florida Supreme Court. In July 2003, the Florida Supreme Court denied review of the case, leaving in place the appellate court ruling.[23]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments – Civil Proceedings
The current public records exemption does not apply to autopsy photographs or video or audio recordings submitted as part of a criminal or administrative proceeding; however, a civil proceeding is not included in the exception. In order to create uniformity, the inclusion of civil proceedings in the list of exceptions is recommended.

Other Comments - Open Government Sunset Review Act
The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

[23] 848 So.2d 1153 (Fla. 2003).

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act regarding autopsy photographs and video and audio recordings; amending s. 406.135, F.S., which provides an exemption from public records requirements for photographs and video and audio recordings of an autopsy in the custody of a medical examiner; reorganizing the section and making editorial changes; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 406.135, Florida Statutes, is amended to read:

406.135 Autopsies; confidentiality of photographs and video and audio recordings; exemption.--

(1) For the purpose of this section, the term "medical examiner" means any district medical examiner, associate medical examiner, or substitute medical examiner acting pursuant to this chapter, as well as any employee, deputy, or agent of a medical examiner or any other person who may obtain possession of a photograph or audio or video recording of an autopsy in the course of assisting a medical examiner in the performance of his or her official duties.

(2) A photograph or video or audio recording of an autopsy held by ~~in the custody of~~ a medical examiner is confidential and exempt from ~~the requirements of~~ s. 119.07(1) and s. 24(a), Art.

I of the State Constitution, except that a surviving spouse may view and copy a photograph or video recording or listen to or copy an audio recording of the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents shall have access to such records. If there is no surviving spouse or parent, then an adult child shall have access to such records.

(3)(a) ~~However,~~ The deceased's surviving relative, with whom authority rests to obtain such records, may designate in writing an agent to obtain such records.

(b) A local governmental entity, or a state or federal agency, in furtherance of its official duties, pursuant to a written request, may view or copy a photograph or video recording or may listen to or copy an audio recording of an autopsy, and unless otherwise required in the performance of their duties, the identity of the deceased shall remain confidential and exempt.

(c) The custodian of the record, or his or her designee, may not permit any other person, except an agent designated in writing by the deceased's surviving relative with whom authority rests to obtain such records, to view or copy such photograph or video recording or listen to or copy an audio recording without a court order. ~~For the purposes of this section, the term "medical examiner" means any district medical examiner, associate medical examiner, or substitute medical examiner acting pursuant to this chapter, as well as any employee, deputy, or agent of a medical examiner or any other person who may obtain possession of a photograph or audio or video~~

~~recording of an autopsy in the course of assisting a medical examiner in the performance of his or her official duties.~~

(4) ~~(2)~~ (a) The court, upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy or to listen to or copy an audio recording of an autopsy and may prescribe any restrictions or stipulations that the court deems appropriate.

(b) In determining good cause, the court shall consider whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form.

(c) In all cases, the viewing, copying, listening to or other handling of a photograph or video or audio recording of an autopsy must be under the direct supervision of the custodian of the record or his or her designee.

(5) ~~(b)~~ A surviving spouse shall be given reasonable notice of a petition filed with the court to view or copy a photograph or video recording of an autopsy or a petition to listen to or copy an audio recording, a copy of such petition, and reasonable notice of the opportunity to be present and heard at any hearing on the matter. If there is no surviving spouse, then such notice must be given to the parents of the deceased ~~deceased's parents~~, and if the deceased has no living parent, then to the adult children of the deceased.

(6) ~~(3)~~ (a) Any custodian of a photograph or video or audio recording of an autopsy who willfully and knowingly violates

this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) Any person who willfully and knowingly violates a court order issued pursuant to this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(7) ~~(c)~~ A criminal or administrative proceeding is exempt from this section, but unless otherwise exempted, is subject to all other provisions of chapter 119, provided however that this section does not prohibit a court in a criminal or administrative proceeding upon good cause shown from restricting or otherwise controlling the disclosure of an autopsy, crime scene, or similar photograph or video or audio recordings in the manner prescribed herein.

(8) ~~(4)~~ This exemption shall be given retroactive application.

~~(5) The exemption in this section is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7143 PCB JU 06-06 Rules of Construction
SPONSOR(S): Judiciary Committee; Simmons
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Judiciary Committee	8 Y, 4 N	Hogge	Hogge
1) State Administration Council		Hogge	Bussey
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

This House Joint Resolution proposes to amend Article X, Section 12, of the State Constitution, relating to rules of construction, to prohibit the application of the maxim "expressio unius est exclusio alterius" in interpreting the extent of political power vested in the legislative branch by the people, unless the limitation is absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision. This maxim holds that "the expression of one thing is the exclusion of another." As far back as 1905, the Florida Supreme Court stated that the maxim should be applied "with great caution to the provisions of an organic law relating to the legislative department...." This sentiment has been echoed in the courts of other states, although many appear to have permitted its application in various circumstances such as qualifications for election to a constitutional office but not in others such as regulating the taxing power of the Legislature. In a recent case, the Florida Supreme Court disapproved of a decision of the 1st District Court of Appeal by applying this maxim to declare Florida's school voucher program unconstitutional. The North Carolina Supreme Court and the California Court of Appeal appear to be examples of courts that have refused to apply this doctrine when interpreting their constitution if not in all cases, then in all but what appear to be very rare circumstances.

Within our constitutional framework, the people are sovereign and the source of all governmental power. The Florida Constitution (like other state constitutions) is the way in which the people have chosen to allocate and regulate their sovereign governmental power not exclusively granted to the federal government in the United States Constitution. This is accomplished primarily by "vesting" the legislative, executive and judicial powers in certain defined offices and collegial bodies. Most other constitutional provisions serve to direct and/or limit the application of these vested powers. Therefore, the bulk of powers exercised by the three branches of government are vested powers; they do not arise out of specific grants of power. Through the Florida Constitution, the people have vested legislative authority in the Legislature with such exceptions as the people have clearly delineated. The legislative branch looks to the Constitution not for sources of power but for limitations upon power.

In contrast, the federal constitution is a constitution of delegated powers, having only those specific powers given to it in the Constitution and those "necessary and proper" to carry out those powers. All other sovereign governmental powers are reserved to the States.

The Division of Elections within the Department of State estimates that the cost of compliance for a proposal with a ballot summary of 75 words or less would be approximately $50,000.

This is a joint resolution which requires passage by a 3/5 vote of each chamber.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This proposal does not directly implicate the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Proposed Changes

This House Joint Resolution proposes to amend Article X, Section 12, of the State Constitution, relating to rules of construction, to prohibit the use of the maxim "expressio unius est exclusio alterius" in interpreting the extent of political power vested in the legislative branch by the people, unless the limitation is absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision. This maxim holds that "the expression of one thing is the exclusion of another."

Background

Constitutional Power and Authority: Contrasting the Federal and State Constitutions

The federal constitution is a constitution of delegated powers, "having only those specific powers given to it in the Constitution,"[1] and those "necessary and proper" to carry out the enumerated powers. All other powers are reserved to the states.[2]

Within our constitutional framework, the people are sovereign and the source of all governmental power. The Florida Constitution (like other state constitutions) is the way in which the people have chosen to allocate and regulate their sovereign governmental power not exclusively granted to the federal government in the United States Constitution and acts as a limitation on governmental powers. This is accomplished primarily by "vesting" the legislative, executive and judicial powers in certain defined offices and collegial bodies. Most other constitutional provisions serve to direct and/or limit the application of these vested powers. Therefore, the bulk of powers exercised by the three branches of government are vested powers; they do not arise out of specific grants of power.

Through the Florida Constitution, the people have vested legislative authority in the Legislature with such exceptions as the people have clearly delineated.[3] "The legislative branch looks to the Constitution not for sources of power but for limitations upon power."[4] The authority of the legislative branch is "plenary" (i.e., "absolute") in the legislative field.[5] It is limited only by the "express and clearly implied provisions of the federal and state constitutions."[6] "In other words, the Legislature may exercise

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[1] John Cooper and Thomas Marks Jr., eds., *Florida Constitutional Law: Cases and Materials, 2d Ed.* (1996), at 3.
[2] U.S. Const. art. X.
[3] Fla. Const. art. III, s. 1.
[4] *State ex. rel. Green v. Pearson*, 14 So.2d 565 (Fla. 1943).
[5] 6 Fla.Jur., s. 119. See also, *County Board of Education of Russell County v. Taxpayers and Citizens of Russell County*, 163 So.2d 629, 634 (Ala. 1964). ("There are no limits to the legislative power of state governments save those written into its constitution. All that the legislature is not forbidden to do by the organic law, state or federal, it has full power to do.")
[6] 6 Fla.Jur., s. 119.

any lawmaking power that does not either expressly or by necessary implication conflict with any other provision of the State or Federal Constitution."[7]

The Application of the Maxim *"Expressio Unius Est Exclusio Alterius"* in Constitutional Interpretation

It is a generally accepted principle that interpreting a constitution, as any written document, only becomes necessary when the plain meaning cannot be ascertained and the intent is ambiguous. Further, that in construing a constitution, effect should be given to every part of the document and every word and where possible, conflicting provisions should be harmonized. There are numerous rules of construction utilized by the courts. The Florida Constitution sets forth several of these such as "(t)itles and subtitles shall not be used in construction."[8]

One such rule of construction is *"expressio unius est exclusio alterius;"* that is, "the expression of one thing is the exclusion of another." For example, if the constitution included or "expressed" specific disqualifications for holding elective office, then applying this maxim, the exclusion of any other disqualifications would be implied. The Ohio Supreme Court used the following illustration to describe the way in which the rule operates when applied in this context:

> Thus, when the General Assembly has full power to legislate in a field that has natural subclasses (A, B, C, D, etc.) and a constitutional provision puts restrictions on subclasses A, B, and C, that does not mean (under application of the doctrine of expressio unius est exclusio alterius) that the constitutional provision has removed the power to legislate as to subclass D. Rather, it means the power to legislate as to subclass D is not restricted.[9]

This maxim generally does not apply with the same force to a constitution as to a statute ("it should be used sparingly" in construing the constitution)[10] and particularly in regards to the legislature.[11]

Florida

As far back as 1905, the Florida Supreme Court stated that the maxim should be applied "with great caution to the provisions of an organic law relating to the legislative department...."[12] This sentiment has been echoed in the courts of other states.[13]

Although Florida courts, like those of other states, have cautioned against its use, they have not prohibited its outright use in construing provisions of the Florida Constitution.[14] Most recently, the

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[7] *Id.*

[8] Fla. Const. art. X, s. 12(h).

[9] *State ex. rel. Jackman v.Court of Common Pleas of Cuyahoga County*, 224 N.E.2d 906, 910 (Ohio 1967). ("The judiciary must proceed with much caution in applying the...maxim (expressio unius est exclusio alterius) to invalidate legislation."

[10] 6 Fla.Jur., s. 69.

[11] *Id.*

[12] *State ex. rel. Moodie v. Bryant,* 39 So. 929, 956 (Fla. 1905). See also, *Marasso v. Van Pelt*, 81 So. 529, 530 (Fla. 1919) (Per *Marasso*: "Organic limitations upon the authority of the Legislature to exercise the police power of the state...should not be implied by invoking the rule of construction "Expressio unius est exclusion alterius," or otherwise, unless it is necessary to do so in order to effectuate some express provision of the Constitution."); *Pine v. Com.*, 93 S.E.2d 652 (Va. 1917) ("The principle of the maxim...should be applied with great caution to those provisions of the Constitution which relate to the legislative department.")

[13] *State ex. rel. Jackman, supra* note 9, at 910 (Per State ex. rel. Jackman, "The judiciary must proceed with much caution in applying the...maxim (expressio unius est exclusio alterius) to invalidate legislation."); *Earhart v. Frohmiller*, 178 P.2d 436 (Az. 1947) and 16 Am.Jur.2d Constitutional Law s. 69.

[14] The Florida Supreme Court has stated that "the principle is well established that, where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it....Therefore, when the Constitution prescribes a manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the

Florida Supreme Court, over sharp dissent, disapproved of a decision of the 1st District Court of Appeal[15] by applying this maxim to declare legislation creating a school voucher program unconstitutional.[16] The Supreme Court read the constitutional provision as a limitation on the power of the Legislature—as an exclusive means for accomplishing a duty contained in the Constitution. The majority defended its use of this maxim, believing the constitutional provision at issue "provides a comprehensive statement of the state's responsibilities regarding the education of its children."[17] In dissent, Justice Bell found the language of the constitutional provision at issue to be "plain and unambiguous" and, therefore, "wholly inappropriate for (the) court to use a statutory maxim such as *expressio unius est exclusio alterius* to imply such a proscription."[18] He believed its use in this case "significantly expands this Court's case law in a way that illustrates the danger of liberally applying this maxim."[19] He wrote:

> In accord with courts across this nation, this Court has long recognized that the *expressio unius* maxim should not be used to imply a limitation on the Legislature's power unless this limitation is absolutely necessary to carry out the purpose of the constitutional provision....We have repeatedly refused to apply this maxim in situations where the statute at issue bore a "real relation to the subject and object" of the constitutional provision.[20]

Other States

As mentioned previously, like Florida, virtually all states appear to caution against the use of this maxim in constitutional construction,[21] although many appear to permit its application in various circumstances such as qualifications for election to a constitutional office but not in others such as regulating the taxing power of the Legislature.[22] For example, the Colorado Supreme Court, while accepting the principle that "all power which is not limited by the constitution is vested in the people and may be exercised by them via their elected representatives so long as the constitution contains no prohibition against it," nonetheless applied the maxim as the rationale for the rule that "the fact that the framers of the state constitution chose to specify the qualifications for this office limits, by implication, the legislature's power to impose additional qualifications."[23] The Louisiana Supreme Court has held that

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constitutional provision. See *Weinberger v. Board of Public Instruction*, 112 So. 253, 256 (Fla. 1927). In *Holmes I*, *infra* note 15, the 1st DCA distinguished *Weinberger* in that the constitution forbade any action other than that specified in the constitution, and the action by the Legislature defeated the purpose of the constitutional provision....(here the court said) in this case, nothing in (the constitutional provision at issue) prohibits the Legislature from allowing the well-delineated use of public funds for private school education...." In *Taylor v. Dorsey*, 19 So.2d 876 (Fla. 1944), the Florida Supreme Court found the principle enunciated in *Weinberger* inapplicable because the statutory provision did not violate the "primary purpose" of the constitutional provision. See *infra*, note 16.

[15] *Bush v. Holmes (Holmes I)*, 767 So.2d 668 (1st DCA 2000).

[16] *Bush v. Holmes,* 919 So.2d 392 (Fla. 2006). The court declared s. 1002.38, F.S. (2005), unconstitutional. The voucher program is entitled the "Opportunity Scholarship Program." In doing so, the majority distinguished the case of *Taylor v. Dorsey*, 19 So.2d 876 (Fla. 1944), cited by Justice Bell in his dissent in opposition to the application of "expressio unius est exclusio alterius" in this case.

[17] *Bush, supra* note 16, at 408.

[18] *Id.,* at 415.

[19] *Id.,* at 420.

[20] *Id.,* at 422. Citing *Marasso v. Van Pelt*, 81 So.529, 530 (Fla. 1919) and *Taylor v. Dorsey*, *supra* note 16.

[21] See *supra* note 13.

[22] *Mercantile Incorporating Co. v. Junkin*, 123 N.W. 1055 (Neb. 1909) ("The maxim...does not apply in the construction of constitutional provisions regulating the taxing power of the Legislature.") See also, *Kramar v. Bon Homme County*, 155 N.W.2d 777 (S.D. 1968);

[23] *Reale v. Board of Real Estate Appraisers*, 880 P.2d 1205, 1208 (Colo. 1994). The court placed great weight on the characterization of the right involved as a "fundamental right reserved to the people—the right to vote for representatives of their choice—(and that the right) would hinge not on constitutional guarantees, but on the General Assembly's willingness to abstain form imposing additional qualifications or holding constitutional offices." Also, in Colorado, the framers of the constitution "did express their intent to permit the legislature to fix additional qualifications for certain offices...." However, the dissent noted that where the constitution strips the General Assembly of power, it does so expressly. The Court sided with the majority of states that had held that "where the Constitution establishes specific eligibility requirements for a particular constitutional office, the constitutional criteria are exclusive.") In this regard, see also *Thomas v.* State, 58 So.2d 173 (Fla. 1952). (Per *Thomas*: "The principle is well established that where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the

"(i)n construing a Constitution, resort may be had to (the) well-recognized rule of construction contained in the maxim "expressio unius est exclusio alterius...."[24]

In contrast, the North Carolina Supreme Court and the California Supreme Court[25] appear to be examples[26] of courts that have refused to apply this doctrine when interpreting their constitution if not in all cases, then in all but what appear to be very rare circumstances. As stated by the North Carolina Supreme Court in embracing the California rationale:

> This doctrine flies directly in the face of one of the underlying principles of North Carolina constitutional law. As Justice Mitchell himself stated for the Court in (the) *Preston* (case):
>
> > "[I]t is firmly established that our State Constitution is not a grant of power.... All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution....This fundamental concept, that a state constitution acts as a limitation, rather than a grant of power, is certainly not unique to North Carolina. The California Court of Appeal, for example, recently reviewed the basic principles of California constitutional law as set out in previous decisions of the California Supreme Court. [27] The following passage from that opinion could serve just as easily as a primer for North Carolina constitutional law: Unlike the federal Constitution, which is a grant of power to Congress, the California [North Carolina] Constitution is a limitation or restriction on the powers of the Legislature. Thus, the courts do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited. Further, "[i]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used." Consequently, the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms. In other words, the doctrine of *expressio unius est exclusio alterius*...is inapplicable."[28]

C. SECTION DIRECTORY:

Not applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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manner in which the thing shall be done is itself a prohibition against a different manner of doing it. Therefore, when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision.") Regarding the application of the maxim for a different policy area, see *State v. Gilman*, 10 S.E. 283 (W.Va.) in which the West Virginia Supreme Court applied the doctrine in invalidating a statutory law relating to the sale of liquor.

[24] *Stokes v. Harrison*, 155 So.2d 373 (La. 1959). See also, *Collingsworth County v. Allred*, 40 S.W.2d 13 (Tx. 1931).

[25] *Dean v. Kuchel*, 230 P.2d 811, 813 (Cal. 1951) ("Specifically, the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms.").

[26] See also, *Eberle v. Nielson*, 306 P.2d 1083, 1086 (Idaho 1957) ("There flows from this fundamental concept, as a matter of logic in its application, the inescapable conclusion that the rule of expressio unius est exclusio alterius has no application to the provisions of our State Constitution."); *Penrod v. Crowley*, 356 P.2d 73, 80 (Idaho 1960) ("The rule...does not apply to provisions of the state constitution."); *State ex. rel. Attorney General v. State Board of Equalization*, 185 P. 708, 711 (Mont. 1919) ("The maxim...cannot be made to serve as a means to restrict the plenary power of the Legislature, nor to control an express provision of the Constitution."); *Earhart v. Frohmiller*, 178 P.2d 436 (Az. 1947) ("(i)t cannot be made to restrict the plenary power of the Legislature."); *State ex. rel. McCormack v. Foley*, 118 N.W.2d 211 (Wis. 1962); *Cathcart v. Meyer*, 2004 WY 49 (Wyo. 2004) (rule is "inapplicable in construing constitutional provisions.")

[27] *County of Fresno v. State*, 268 Cal.Rptr. 266, 270 (Cal. Ct. App. 1990).

[28] *Baker v. Martin*, 410 S.E.2d 887, 891 (N.C. 1991).

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   Art. XI, s. 5, of the Florida Constitution, requires that each proposed amendment to the Constitution be published in a newspaper of general circulation in each county two times prior to the general election. The Division of Elections within the Department of State estimates that the cost of compliance for a proposal with a ballot summary of 75 words or less would be approximately $50,000.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The mandates provision does not apply to House Joint Resolutions.

2. Other:

   Article XI, Section 1 of the State Constitution provides the Legislature with the authority to propose amendments to the State Constitution by joint resolution approved by three-fifths of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office or may be placed at a special election held for that purpose.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Not applicable.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 15, 2006, the Judiciary Committee adopted one amendment and reported the bill favorably as a CS. The CS differs from the original bill in that the CS qualifies the prohibition against court use of the *expressio unius* maxim by permitting it when "absolutely necessary to unless the limitation is absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision.

House Joint Resolution

A joint resolution proposing an amendment to Section 12 of Article X of the State Constitution; revising rules of construction to be used when interpreting the extent of political power vested in the legislative branch to provide that the expression of one thing does not imply the exclusion of another, unless the limitation is absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 12 of Article X of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE X

MISCELLANEOUS

SECTION 12. Rules of construction.--Unless qualified in the text the following rules of construction shall apply to this constitution.

(a) "Herein" refers to the entire constitution.

(b) The singular includes the plural.

(c) The masculine includes the feminine.

(d) "Vote of the electors" means the vote of the majority of those voting on the matter in an election, general or

special, in which those participating are limited to the electors of the governmental unit referred to in the text.

(e) Vote or other action of a legislative house or other governmental body means the vote or action of a majority or other specified percentage of those members voting on the matter. "Of the membership" means "of all members thereof."

(f) The terms "judicial office," "justices" and "judges" shall not include judges of courts established solely for the trial of violations of ordinances.

(g) "Special law" means a special or local law.

(h) Titles and subtitles shall not be used in construction.

(i) In interpreting the extent of political power vested in the legislative branch by the people, the expression of one thing does not imply the exclusion of another, unless the limitation is absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE X, SECTION 12

RULES OF CONSTRUCTION.--Proposing an amendment to the State Constitution to revise the rules of construction to be used when interpreting the State Constitution. The revision provides that, when interpreting the extent of political power vested in the Legislature by the people, the expression of one thing does not imply the exclusion of another, unless the exclusion is

absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision. This would preclude application of the general maxim "expressio unius est exclusio alterius," which stands for the proposition that the expression of one thing is the exclusion of another, except when the exclusion is absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7161 PCB GO 06-30 Public Records/State Board of Administration
SPONSOR(S): Governmental Operations Committee, Rivera
TIED BILLS: **IDEN./SIM. BILLS:** SB 1308

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee	7 Y, 0 N	Mitchell	Williamson
1) State Administration Council		Mitchell	Bussey
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

This committee bill was approved by the Governmental Operations Committee pursuant to House Rule 7.9. The bill contains a public records exemption sought by the State Board of Administration for certain information related to alternative investments:

- Defines proprietary confidential business information and specifically excludes certain information from this definition.
- Creates an exemption from the constitutional and statutory public records requirements for proprietary confidential business information held by the State Board of Administration regarding alternative investments for 10 years.
- Provides access to inspect or copy a particular public record if requested and if a proprietor fails to verify certain required information through a written declaration.
- Permits any person to petition the appropriate court in Leon County, Florida, for the public release of any record made confidential and exempt by the bill.

The bill contains a public necessity statement.

This bill does not appear to create, modify, or eliminate rulemaking authority.

This bill does not appear to have a fiscal impact on local governments. The bill does not appear to have an impact on state government revenues, but may have a minimal fiscal impact on the expenditures of state government for implementation.

This bill requires passage by a two-thirds vote of each house.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill decreases access to public records.

B. EFFECT OF PROPOSED CHANGES:

Background on Alternative Investments

The State Board of Administration exists pursuant to article IV, section 4(e) of the Florida Constitution. It is composed of the governor, as chair, the chief financial officer, and the attorney general. The SBA is charged with investing all the funds in the System Trust Fund of the Florida Retirement System as well as other funds[1] such as the Public Employee Optional Retirement Program Trust Fund, the Florida Hurricane Catastrophe Trust Fund, the Lawton Chiles Endowment Fund, and the Local Government Surplus Funds Trust Fund.[2] For fiscal year 2003-2004, the net asset value of all funds managed by the SBA was $134.2 billion.[3] The System Trust Fund of the Florida Retirement System comprises 76 percent of these assets.[4]

Section 215.44, Florida Statutes, sets forth the powers and duties of the SBA in relation to the investment of trust funds. Among the powers granted to the SBA is the authority to make purchases, sales, exchanges, and reinvestments for the System Trust Fund.[5] The SBA is charged to ensure that investments are handled in the best interests of the state,[6] but also to have an appropriately diversified portfolio which maximizes financial return consistent with the risks incumbent in each investment.

As part of its best interests, maximization, and diversification actions, the SBA, invests in multiple asset classes: domestic equities (U.S. stocks), global equities (U.S. and non-U.S. stocks), international equities (non-U.S. stocks), fixed income (bonds), real estate (including direct-owned properties and real estate investment trusts), and cash/cash equivalents (short-term instruments).[7] The SBA also invests in an "alternative investment" asset class which "is composed principally of private equity investments through limited partnerships and captive (exclusive) arrangements" with resulting portfolio investments being "predominantly equity investments in domestic companies."[8] In other words, the alternative investments class generally consists of private equity funds, venture capital funds, distress debt funds, and hedge funds.[9]

The Total Fund Investment Plan approved by the Board of Trustees provides a target of five percent for the alternative investments assets class with a range from one percent to eight percent.[10] The actual investment for the System Trust Fund has been approximately 3.27 percent over the last four years:[11]

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[1] Fla. Stat. § 215.44(1) (2005).
[2] Fla. State Board of Adm., 2003-2004 Inv. Rep. (2004) at 3, available at http://www.sbafla.com/pdf/investment/annual/2004/SBA-AIR.pdf (last visited Feb. 20, 2006).
[3] *Id.*
[4] *Id.*
[5] Fla. Stat. § 215.44(2)(a) (2005).
[6] *Id.*
[7] Fla. State Board of Adm., 2003-2004 Investment Rep., at 14.
[8] *Id.* at 15.
[9] Fla. State Board of Adm., Summary of SBA Public Records Exemption Proposal (Dec. 1, 2005), at 1.
[10] Fla. State Board of Adm., Fla. Ret. Sys. Total Fund Inv. Plan (As Approved by the Trustees Aug. 12, 2003), at 5, available at http://www.sbafla.com/pdf/funds/FRSDB_TFIP_2003_07_01.pdf (last visited Feb. 20, 2006)
[11] Fla. State Board of Adm., FRS DB Assets by Type, available at http://www.sbafla.com/popup.aspx?image=images\WebCharts\FRSDB_assets_by_type.gif (last visited Feb. 20, 2006); Fla. State Board of Adm., Alternative Investment Information for FRS DB Plan, available at http://www.sbafla.com/funds_detail.aspx?parent=1&section=8&type=ai#3 (last visited Feb. 20, 2006).

	2002	2003	2004	2005
Alternative Investments ($/millions)	2,822	3,326	3,410	3,581
Net Contributions ($/millions)	(135)	445	(225)	(270)
Market Gain (Loss) ($/millions)	(145)	59	309	440
Total Market Value ($/millions)	86,166	96,490	106,752	114,122
Percent Alternative Investments	3.28	3.45	3.19	3.14

In order to make alternative investments, the SBA engages private equity managers:

> Only 30% of all private equity partnerships have been able to produce the SBA-required premium over public market returns which justify incurring the risks associated with these investments. The top of these private equity managers have generated sizable premiums over the public markets (19.4% and 29.7%) because of substantial information advantages. The information advantages of these private equity managers include confidential business information and trade secrets.[12]

Some of this information may become a public record which must be open to inspection and copying[13] unless exempt or confidential and exempt.[14]

Access to Public Records

Access to the public records of any public body is a right provided by Article 1, section 24(a) of the Florida Constitution:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution

Section 119.07(1), Florida Statutes, provides further implementation of this right:

> Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.[15]

Requirements for Public Records Exemptions

The Legislature may limit the right of the public to inspect or copy any public record by creating an exemption by general law. This general law must "state with specificity the public necessity justifying the exemption" and be "no broader than necessary to accomplish the stated purpose of the law." The Legislature has created numerous public records exemptions.

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[12] Fla. State Board of Adm., Summary of SBA Public Records Exemption Proposal (Dec. 1, 2005).
[13] Fla. Stat. § 119.07(1) (2005).
[14] There is a difference between information and records that the Legislature has designated exempt from public disclosure and those the Legislature has deemed confidential and exempt. Information and records classified exempt from public disclosure are permitted to be disclosed under certain circumstances. See *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature designates certain information and records confidential and exempt from public disclosure, such information and records may not be released by the records custodian to anyone other than the persons or entities specifically designated in the statutory exemption. *See* Attorney General Opinion 85-62, Aug. 1, 1985.
[15] Fla. Stat. § 119.07(1)(a) (2005).

Relevant Public Records Exemptions: State Board of Administration

Some public records of the State Board of Administration are currently confidential and exempt:

- Records relating to acquiring, hypothecating, or disposing of real property or related personal property or mortgage interests in same, as well as interest in collective real estate investment funds, publicly traded securities, or private placement investments; [16]
- Reports and documents relating to value, offers, counteroffers, or negotiations until closing is complete and all funds have been disbursed;[17]
- Reports and documents relating to tenants, leases, contracts, rent rolls, and negotiations in progress until the executive director determines that releasing such information would not be detrimental to the interests of the board and would not cause a conflict with the fiduciary responsibilities of the State Board of Administration;[18]
- Records relating to investments made by the board pursuant to its constitutional and statutory investment duties and responsibilities until 30 days after completion of an investment transaction;[19] and
- Information concerning service provider fees may be maintained until six months after negotiations relating to such fees have been terminated.[20]

A New Public Records Exemption for the State Board of Administration

This proposed committee bill is being considered by the Governmental Operations Committee pursuant to House Rule 7.9. The bill contains a public records exemption sought by the State Board of Administration for certain information related to alternative investments.

Public Records Exemption for Alternative Investments: Definitions

The bill provides definitions for a new public records exemption for the State Board of Administration.

The bill defines an alternative investment as "an investment...in a private equity fund, venture fund, hedge fund, or distress fund or a direct investment in a portfolio company through an investment manager."

The bill also defines "proprietary confidential business information" as information which has been designated by a proprietor as meeting all three of the following criteria:

Proprietary Confidential Business Information Criteria	Elements of the Criteria
1. *Owned or controlled* by a proprietor.	A proprietor is defined as "an alternative investment vehicle, a portfolio company in which the alternative investment vehicle is invested, or an outside consultant, including the respective authorized officers, employees, agents, or successors in interest, which controls or owns information provided to the State Board of Administration."

[16] Fla. Stat. § 215.44(8)(a) (2005).
[17] *Id.*
[18] *Id.*
[19] Fla. Stat. § 215.44(8)(b) (2005).
[20] *Id.*

Proprietary Confidential Business Information Criteria	Elements of the Criteria
2. Intended to be and is treated by the proprietor as *private*.	The disclosure of this information must harm the business operations of the proprietor. The information must not have been intentionally disclosed by the proprietor unless pursuant to a private agreement that provides that the information will not be released to the public except as required by law or legal process or pursuant to law or an order of a court or administrative body;
3. Relates to any of the designated areas.	These designated areas include: - Trade secrets - Information provided to the State Board of Administration regarding a prospective investment in a private equity fund, venture fund, hedge fund, distress fund, or portfolio company which is proprietary to the provider of the information. - Financial statements and auditor reports of an alternative investment vehicle. - Meeting materials of an alternative investment vehicle relating to financial, operating, or marketing information of the alternative investment vehicle. - Information regarding the portfolio positions in which the alternative investment vehicles invest. - Capital call and distribution notices to investors of an alternative investment vehicle. - Alternative investment agreements and related records. - Information concerning investors, other than the State Board of Administration, in an alternative investment vehicle.

The bill also defines what information does not meet the definition of proprietary confidential business information and which would continue to be available as a public record:

1. The name, address, and vintage year of an alternative investment vehicle and the identity of the principals involved in the management of the alternative investment vehicle.

2. The dollar amount of the commitment made by the State Board of Administration to each alternative investment vehicle since inception.

3. The dollar amount and date of cash contributions made by the State Board of Administration to each alternative investment vehicle since inception.

4. The dollar amount, on a fiscal-year-end basis, of cash distributions received by the State Board of Administration from each alternative investment vehicle.

5. The dollar amount, on a fiscal-year-end basis, of cash distributions received by the State Board of Administration plus the remaining value of alternative-vehicle assets that are attributable to the State Board of Administration's investment in each alternative investment vehicle.

6. The net internal rate of return of each alternative investment vehicle since inception.

7. The investment multiple of each alternative investment vehicle since inception.

8. The dollar amount of the total management fees and costs paid on an annual fiscal-year-end basis by the State Board of Administration to each alternative investment vehicle.

9. The dollar amount of cash profit received by the State Board of Administration from each alternative investment vehicle on a fiscal-year-end basis.

The bill also provides definitions for alternative investment vehicle,[21] portfolio company,[22] and portfolio positions.[23]

Public Records Exemption for Alternative Investments: Operation

The bill makes proprietary confidential business information held by the State Board of Administration confidential and exempt from section 119.07(1), Florida Statutes, and article I, section 24(a) of the Florida Constitution for 10 years after the termination of the alternative investment. The bill also makes the exemption applicable to proprietary confidential business information held by the State Board of Administration before, on, or after October 1, 2006.

The bill, however, permits access to inspect or copy a particular record under the provisions of section 119.07(1), Florida Statutes, if a proprietor, within a reasonable period of time after the request received by the State Board of Administration, fails to verify through a written declaration pursuant to section 92.525, Florida Statutes, that a particular records contains the following information:

1. The identity of the proprietary confidential business information and its specific location in the requested record;

2. If the proprietary confidential business information is a trade secret, a verification that it is a trade secret as defined in s. 688.002, Florida Statutes;

3. That the proprietary confidential business information is intended to be and is treated by the proprietor as private, is the subject of efforts of the proprietor to maintain its privacy, and is not readily ascertainable or publicly available from any other source; and

4. That the disclosure of the proprietary confidential business information to the public would harm the business operations of the proprietor.

Public Records Exemption for Alternative Investments: Petition for Public Release

Any person may petition a court of competent jurisdiction in Leon County, Florida for an order for the public release of those portions of any record made confidential and exempt by operation of this bill. The petition must be served, along with any other initial pleadings, on the SBA and on the proprietor of the information sought to be released, if the proprietor can be determined through diligent inquiry.

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[21] Fla. HPCB GO 01-30, §1 (2005) (defined as "the limited partnership, limited liability company, or similar legal structure or investment manager through which the State Board of Administration invests in a portfolio company").
[22] Fla. HPCB GO 01-30, §1 (2005) (defined as "a corporation or other issuer, any of whose securities are owned by an alternative investment vehicle or the State Board of Administration and any subsidiary of such corporation or other issuer").
[23] Fla. HPCB GO 01-30, §1 (2005) (defined as "individual investments in portfolio companies which are made by the alternative investment vehicles, including information or specific investment terms associated with any portfolio company investment").

The bill requires the court to make three findings in any order for the release of a public record: (1) that the record or portion thereof is not a trade secret as defined in section 688.002, Florida Statutes; (2) that a compelling public interest is served by the release of the record or portions thereof which exceed the public necessity for maintaining the confidentiality of such record; and (3) that the release of the record will not cause damage to or adversely affect the interests of the proprietor of the released information, other private persons or business entities, the State Board of Administration, or any trust fund, the assets of which are invested by the State Board of Administration.

Public Records Exemption for Alternative Investments: Open Government Sunset Review Act

Section 119.15, Florida Statutes, requires the review and repeal or reenactment of any exemption from section 24, article I of the Florida Constitution and section 119.07(1), Florida Statutes, in the fifth year after the enactment of a new exemption. Unless the Legislature acts to reenact the newly created exemption, it is repealed on October 2nd of the fifth year. The bill recognizes this required review and provides for repeal on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

Public Records Exemption for Alternative Investments: Public Necessity Statement

This bill provides a public necessity statement to comport with the requirements of article 1, section 24(c) of the Florida Constitution.

C. SECTION DIRECTORY:

Section 1: Creates paragraph (c) of subsection 8 of section 215.44, Florida Statutes, to create a public records exemption for certain investment information held by the State Board of Administration.

Section 2: Sets forth the public necessity statement for the exemption.

Section 3: Provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not appear to create, modify, amend, or eliminate any revenues of state government.

2. Expenditures:

   The bill likely could create a fiscal impact on the State Board of Administration because staff responsible for complying with public records requests will require training relating to the newly created public records exemption. In addition, the State Board of Administration could incur costs associated with redacting the confidential and exempt information prior to releasing a record.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not appear to create, modify, amend, or eliminate any revenues of local governments.

2. Expenditures:

   This bill does not appear to create, modify, amend, or eliminate any expenditures of local government.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not appear to reduce the percentage of a state tax shared with counties or municipalities. This bill does not appear to reduce the authority that municipalities have to raise revenue.

2. Other:

Article 1, section 24(c) of the Florida Constitution contains three requirements for any general law creating an exemption to the constitutional right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf: (1) passed by a two-third votes of each house, (2) state with specificity the public necessity justifying the exemption, and (3) be no broader than necessary to accomplish the stated purpose of the law. As such, the bill requires a two-thirds vote for passage. The adequacy of the public necessity statement and whether the bill is broader than necessary are ultimately matters of judicial interpretation.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create, modify, or eliminate rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

At its meeting on March 15, 2006, the Governmental Operations Committee adopted two amendments and reported the proposed committee bill favorably:

- Amendment 1 corrected a reference to the State Board of Administration.
- Amendment 2 addressed the application of the exemption and revises the structure, but not the operation, of the provision related to the release of records.

A bill to be entitled

An act relating to a public records exemption for alternative investments; amending s. 215.44, F.S.; providing definitions; defining "proprietary confidential business information" and specifying information which does not constitute proprietary confidential business information; creating an exemption from public records requirements for proprietary confidential business information held by the State Board of Administration regarding alternative investments; providing for limited duration of the exemption; providing for retroactive application of the exemption; authorizing the inspection and copying of confidential and exempt records if the proprietor of the information fails to verify that a record contains certain information within a specified period of time; authorizing a court to order the release of confidential and exempt records upon making certain findings; providing for future review and repeal; providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (c) is added to subsection (8) of section 215.44, Florida Statutes, to read:

215.44 Board of Administration; powers and duties in relation to investment of trust funds.--

(8)

(c)1. As used in this paragraph, the term:

a. "Alternative investment" means an investment by the State Board of Administration in a private equity fund, venture fund, hedge fund, or distress fund or a direct investment in a portfolio company through an investment manager.

b. "Alternative investment vehicle" means the limited partnership, limited liability company, or similar legal structure or investment manager through which the State Board of Administration invests in a portfolio company.

c. "Portfolio company" means a corporation or other issuer, any of whose securities are owned by an alternative investment vehicle or the State Board of Administration and any subsidiary of such corporation or other issuer.

d. "Portfolio positions" means individual investments in portfolio companies which are made by the alternative investment vehicles, including information or specific investment terms associated with any portfolio company investment.

e. "Proprietor" means an alternative investment vehicle, a portfolio company in which the alternative investment vehicle is invested, or an outside consultant, including the respective authorized officers, employees, agents, or successors in interest, which controls or owns information provided to the State Board of Administration.

f. "Proprietary confidential business information" means information that has been designated by the proprietor when provided to the State Board of Administration as information that is owned or controlled by a proprietor; that is intended to be and is treated by the proprietor as private, the disclosure

of which would harm the business operations of the proprietor and has not been intentionally disclosed by the proprietor unless pursuant to a private agreement that provides that the information will not be released to the public except as required by law or legal process, or pursuant to law or an order of a court or administrative body; and that concerns:

(I) Trade secrets as defined in s. 688.002.

(II) Information provided to the State Board of Administration regarding a prospective investment in a private equity fund, venture fund, hedge fund, distress fund, or portfolio company which is proprietary to the provider of the information.

(III) Financial statements and auditor reports of an alternative investment vehicle.

(IV) Meeting materials of an alternative investment vehicle relating to financial, operating, or marketing information of the alternative investment vehicle.

(V) Information regarding the portfolio positions in which the alternative investment vehicles invest.

(VI) Capital call and distribution notices to investors of an alternative investment vehicle.

(VII) Alternative investment agreements and related records.

(VIII) Information concerning investors, other than the State Board of Administration, in an alternative investment vehicle.

g. "Proprietary confidential business information" does not include:

(I) The name, address, and vintage year of an alternative investment vehicle and the identity of the principals involved in the management of the alternative investment vehicle.

(II) The dollar amount of the commitment made by the State Board of Administration to each alternative investment vehicle since inception.

(III) The dollar amount and date of cash contributions made by the State Board of Administration to each alternative investment vehicle since inception.

(IV) The dollar amount, on a fiscal-year-end basis, of cash distributions received by the State Board of Administration from each alternative investment vehicle.

(V) The dollar amount, on a fiscal-year-end basis, of cash distributions received by the State Board of Administration plus the remaining value of alternative-vehicle assets that are attributable to the State Board of Administration's investment in each alternative investment vehicle.

(VI) The net internal rate of return of each alternative investment vehicle since inception.

(VII) The investment multiple of each alternative investment vehicle since inception.

(VIII) The dollar amount of the total management fees and costs paid on an annual fiscal-year-end basis by the State Board of Administration to each alternative investment vehicle.

(IX) The dollar amount of cash profit received by the State Board of Administration from each alternative investment vehicle on a fiscal-year-end basis.

2. Proprietary confidential business information held by

the State Board of Administration regarding alternative investments is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution for 10 years after the termination of the alternative investment. This exemption applies to proprietary confidential business information held by the State Board of Administration before, on, or after October 1, 2006.

3. Notwithstanding the provisions of subparagraph 2., a request to inspect or copy a record under s. 119.07(1) which contains proprietary confidential business information shall be granted if the proprietor of the information fails, within a reasonable period of time after the request is received by the State Board of Administration, to verify the following to the State Board of Administration through a written declaration in the manner provided by s. 92.525:

a. The identity of the proprietary confidential business information and its specific location in the requested record;

b. If the proprietary confidential business information is a trade secret, a verification that it is a trade secret as defined in s. 688.002;

c. That the proprietary confidential business information is intended to be and is treated by the proprietor as private, is the subject of efforts of the proprietor to maintain its privacy, and is not readily ascertainable or publicly available from any other source; and

d. That the disclosure of the proprietary confidential business information to the public would harm the business operations of the proprietor.

4. Any person may petition a court of competent jurisdiction for an order for the public release of those portions of any record made confidential and exempt by subparagraph 2. Any action under this subparagraph must be brought in Leon County, Florida, and the petition or other initial pleading shall be served on the State Board of Administration and, if determinable upon diligent inquiry, on the proprietor of the information sought to be released. In any order for the public release of a record under this subparagraph, the court shall make a finding that the record or portion thereof is not a trade secret as defined in s. 688.002, that a compelling public interest is served by the release of the record or portions thereof which exceed the public necessity for maintaining the confidentiality of such record, and that the release of the record will not cause damage to or adversely affect the interests of the proprietor of the released information, other private persons or business entities, the State Board of Administration, or any trust fund, the assets of which are invested by the State Board of Administration.

5. This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that proprietary confidential business information held by the State Board of Administration regarding alternative investments be held confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Art. I of the State Constitution

for 10 years after the termination of the alternative investment. Disclosing proprietary confidential business information, including trade secrets as defined in s. 688.002, Florida Statutes, used in determining how private equity investments are made or managed by private partnerships investing assets on behalf of the State Board of Administration would negatively affect the business interests of private partnerships that rely heavily on their information advantage to generate investment returns, and competitor partnerships could gain an unfair competitive advantage if provided access to such information. Maintaining the information advantage of highly skilled private equity investment managers is necessary in order for the State Board of Administration to generate an adequate return from its assets committed to this high-risk segment of the market, since only those managers having a strong information advantage have generated adequate risk-adjusted returns. Research shows that 60 percent of all private equity partnerships have delivered a return less than that of the lower-risk public markets. Only 30 percent of all private equity partnerships have been able to produce the State Board of Administration's required premium over public-market returns to justify incurring the risks associated with these investments. The ninth and tenth deciles of private equity managers are those having a substantial information advantage and they have generated sizable premiums over the public markets, with net returns of 19.4 percent and 29.7 percent, respectively. The Legislature finds that the exemption of proprietary confidential business information used in or implying how private equity

investments are made or managed is necessary for the effective and efficient administration of the State Board of Administration's asset-management program. Assets of the Florida Retirement System must grow rapidly in order to keep pace with growth in the system's liabilities and to manage the costs of employer contributions. In order to meet its investment objectives, the State Board of Administration must invest in diversified asset types, including high-return, high-risk private equity partnerships. Those partnerships that have and are able to maintain a substantial information advantage over their competitors are likely to provide an adequate return. The release of proprietary confidential business information, including trade secrets, revealing how private equity investments are made or managed could result in inadequate returns and ultimately frustrate attainment of the investment objective of the State Board of Administration, subsequently increasing contribution costs for employers in the Florida Retirement System and lowering the system's funded ratio. It is the Legislature's intent to allow the public access to sufficient information in order to be informed regarding the alternative investments of the State Board of Administration and to balance the public's right to information against the right of private business entities to be protected from harmful disclosure of confidential and exempt proprietary confidential business information, the disclosure of which would injure them in the marketplace, impair the ability of the State Board of Administration to invest in the best performing alternative investment vehicles, and diminish investment earnings in the

Florida Retirement System Trust Fund. It is also the Legislature's intent to establish consistency with regard to the classification of information relating to alternative investments by the State Board of Administration as either confidential or suitable for public disclosure. In finding that the public records exemption created by this act is a public necessity, the Legislature finds that the public and private harm in disclosing proprietary confidential business information relating to alternative investments by the State Board of Administration significantly outweighs any public benefit derived from disclosure; that the exemption created by this act will enhance the ability of the State Board of Administration to fulfill its duties as an investment fiduciary by making it more effective and competitive in the marketplace as an investor that is able to gain access to the best alternative investment vehicles; and that the public's ability to be informed regarding the alternative investments made by the State Board of Administration is preserved by the disclosure of information excepted from the created exemption.

Section 3. This act shall take effect October 1, 2006.